84-998 (1)

Office-Supreme Court, U.S.
FILED
NOV 26 1984
ALEXANDER L. STEVAS,
CLERK

CASE NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

ROBERT E. GIBSON, et al,

Petitioner,

vs.

GEORGE FIRESTONE,

Respondent.

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

James G. Mahorner
Attorney for Petitioner
1020 East Lafayette Street
Tallahassee, Florida 32301
Phone: (904) 656-3591

35pp

CASE NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

ROBERT E. GIBSON, et al,

Petitioner,

vs.

GEORGE FIRESTONE,

Respondent.

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

James G. Mahorner
Attorney for Petitioner
1020 East Lafayette Street
Tallahassee, Florida 32301
Phone: (904) 656-3591

QUESTIONS PRESENTED

QUESTION I

WHETHER THE EXCLUSION FROM STATE COURT PROCEEDINGS OF PETITIONERS WHO AS TAXPAYING ELECTORS SPONSORED AND OBTAINED A STATE BALLOT POSITION FOR A TAX LIMITING CONSTITUTIONAL AMENDMENT WHILE PERMITTING AN OPPONENT OF SUCH AMENDMENT PARTY STATUS AS A TAXPAYING ELECTOR TO LITIGATE THE DESTRUCTION OF THE BALLOT STATUS VIOLATED THE EQUAL PROTECTION CLAUSE OF THE XIV AMENDMENT OF THE U. S. CONSTITUTION.

QUESTION II

WHETHER DESTRUCTION OF THE BALLOT STATUS OF THE CONSTITUTIONAL AMENDMENT SPONSORED BY PETITIONERS IN LITIGATION IN WHICH PARTY STATUS TO DEFEND THE AMENDMENT WAS LIMITED TO

THE FLORIDA SECRETARY OF STATE WHO OPPOSED THE AMENDMENT, AND WHO MADE NO DEFENSE, AND WHO FACILITATED DESTRUCTION OF THE BALLOT STATUS DEPRIVED PETITIONER OF DUE PROCESS OF LAW UNDER THE XIV AMENDMENT OF THE U. S. CONSTITUTION.

QUESTION III

DID THE COMBINATION OF THE CIRCUMSTANCES INVOLVING DENIAL OF PARTY STATUS TO ALL WISHING TO DEFEND THE BALLOT POSITION OF THE CONSTITUTIONAL AMENDMENT WITH THAT OF RETRO-ACTIVELY APPLYING MODIFICATION OF THAT INTERPRETATION OF WRITTEN LAW RELIED ON BY THE PETITIONERS IN MAKING LARGE EXPENDITURES TO ACHIEVE A BALLOT POSITION REACH THAT POINT OF FUNDAMENTAL UNFAIRNESS SUFFICIENT TO CAUSE A DENIAL OF THAT DUE PROCESS OF LAW PROVIDED BY THE XIV AMENDMENT OF THE U. S. CONSTITUTION.

PARTIES

In addition to the named parties, the following are petitioners: Ed Havill, Y. Y. Phillips, George Schulte, Floridians for Tax Relief (a political committee composed of 14,000 members) and Limit Government Committee.

TABLE OF CONTENTS

	PAGE NO.
Reference to Official Reports	1
Jurisdictional Grounds	2
Constitutional Provisions and Statutes	3
Statement of the Case	4
Argument	10
Conclusion	26

.....

Appendix

CITATION OF AUTHORITIES

PAGE NO

Aerojet-General Co. v. Askew
511 F.2d. 710 (S. Cir. 1978).....14,16

Arkla Exploration Co. v. Watt
548 F. Supp. 466.....14

Anderson v. Celebrezze
75 L.Ed. 547 (1983).....22

Duncan v. Poythress
657 F.2d. 691 (5th Cir. 1981).....18

Fine v. Firestone
448 So.2d. 984 (Fla. 1984).....1

Florida Forest & Park Service v.
Strickland, 18 So.2d. 251 (Fla. 1944)..23

Floridians v. Lets Help Florida
323 So.2d. 33.....7,21

Griffin v. Burns

570 F.2d. 1065 (1st Cir. 1978).....17

Humphrey V. Smathers

338 So.2d. 819 (Fla. 1971.....23

Holt v. Virginia

381 U.S. 131 (1965).....14

Keating v. State

157 So.2d. 567 (Fla.App.).....14

Logan v. Zimmerman Brush Co.

455 U.S. 422 (1982).....12

Shelley v. Kraemer

334 U.S. 1 (1947) 19

Weber v. Smather

338 So.2d. 819 (Fla. 1976) 7

Winter Haven v. Gillespie

84 F.2d. 285 (Fla. 1936).....14

CITATION OF FEDERAL OPINIONS BELOW

See Appendix

CITATION TO COLLATERAL STATE OPINION

Fine v. Firestone, 443 So.2d. 253 (Fla. DCA 1984) 448 So.2d. 984 (Fla. 1984).

JURISDICTIONAL STATEMENT

The U. S. Court of Appeals entered its judgment on August 28, 1984 which became final without a Petition for Rehearing being filed. The Supreme Court's jurisdiction to review such opinion on certiorari is based upon 28 U.S.C. section 2101(c) and U. S. Supreme Court Rule 19, 28 U.S.C.A.

APPLICABLE CONSTITUTIONAL PROVISIONS

U.S.C.A. Constution Amendment 14, section 1.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Each of the petitioners contributed substantial money and labor which resulted in a proposed tax limiting Florida constitutional amendment receiving a certificate of ballot position the 21st of March, 1983, from the Secretary of State (Intervenors Complaint, paragraph 2 and 4). The Florida Supreme Court stated in 1983 that it would not apply modifications in its opinions to those who relied on the opinion before it was modified, and plaintiffs relied on such unmodified pronouncement and an unmodified 1978 and 1976 Florida Supreme Court holding as to what is a correct single subject form of a proposed constitutional amendment and relief upon approval of the Secretary of the form of the tax limiting amendment in obtaining the 600,000 signatures prior to receiving the certification of

ballot position (IIC 4, 5 and II Int.C. 3) (means Complaint Count II, Paragraph 4).

In July 1984, state complaintant Martin Fine (made a defendant below and dismissed by the Federal District Court at the commencement of the final hearing), brought a suit in the First District Court of Appeals of the State of Florida against Secretary, seeking to have the proposed amendment struck from the ballot (IC III). The Secretary of State, instead of defending the tax limiting proposal, assisted state complaintant's position by signing a consent to issuance of order to show cause submitted to him by attorney for state complaintant (TT 35-39, I C 3). The Secretary thereafter filed a response stating he was not a party having an interest in the defense of the tax limiting amendment and made no legal arguments in its support (I C 3). One state judge placed a

preliminary ruling note that the case lacked a party in interest for defense of the suit (TT 52-54).

The proponents urging each of the characteristics of standing urged by state complaintant, i.e., tax paying elector of the state of Florida, sought to intervene in defense of the tax limiting amendment, but were limited solely to amicus status (I C 4, TT 108-110). The District Court sustained the candidacy of the tax limiting amendment but certified without objection from any party (amicus could not object) the matter to the Florida Supreme Court (I C 5). While the issue of the validity of the amendment was before the courts, the Attorney General (the sole attorney representing the sole party on the defense side of the case) appeared before the Florida Bar an agent an arm of the Supreme Court and sought and obtained a

resolution of such body opposing the amendment (TT 47, 77). The Attorney General during litigation opposed the amendment publicly (TT 95). He refused to appoint a special prosecutor willing to support the tax limiting amendment (TT 94).

The Florida Supreme Court invalidated the proposed amendment, finding it necessary to modify the two cases of Floridians Against Casino Takeover v. Let's Help Florida, 323 So.2d. 337 (Fla. 1978) and Weber v. Smathers, 338 So.2d. 819 (Fla. 1976) and to apply the modifications retrospectively to the supporters of the amendment even though the supporters had relied on such cases to construct the amendment and had acted on such reliance expending substantial labor and funds (II C 4). Proponents having no party status in the state litigation (though appearing in both state courts as amicus)

filed in the U. S. District Court for the Northern District of Florida a civil rights suit against the Florida Secretary of State, George Firestone, and Martin Fine, the complaintant in the state court system (IC 1). State complaintant was dismissed at his request pursuant to the court finding that no type of injunctive order was appropriate as to him (TT 4-6). The court held a final hearing, heard the testimony and admitted all 16 of plaintiffs' documents into evidence and the deposition of the Secretary and Mr. Gibson (TT 107, 117). The court, at the end of the final hearing, dismissed the complaint as not stating a cause of action (TT 159, 160). The court stated that it considered both the evidence and law in dismissing the complaint (TT 158).

An appeal to the U.S. Court of Appeals of the Eleventh Circuit as authorized by 28

U.S.C. section 1291 resulted in an affirmance with written opinion set forth in the appendix. Review is now sought by Petition for Writ of Certiorari.

QUESTION I

WHETHER THE EXCLUSION FROM STATE COURT PROCEEDINGS OF PETITIONERS WHO AS TAXPAYING ELECTORS SPONSORED AND OBTAINED A STATE BALLOT POSITION FOR A TAX LIMITING CONSTITUTIONAL AMENDMENT WHILE PERMITTING AN OPPONENT OF SUCH AMENDMENT PARTY STATUS AS A TAXPAYING ELECTOR TO LITIGATE THE DESTRUCTION OF THE BALLOT STATUS VIOLATED THE EQUAL PROTECTION CLAUSE OF THE XIV AMENDMENT OF THE U. S. CONSTITUTION.

Denial of petitioners' demands to be made parties to the state proceedings on the basis of the same status as found adequate to provide party status to the opponent in the tax limiting amendment was a denial of equal protection. Thus petitioners as taxpaying electors were denied the right to defend the

ballot position for their political ideology of tax limitation but Martin Fine, an opponent of such ideology was permitted entry into the courts to attack the ballot status based upon the urging of the identical taxpaying elector characteristics urged by petitioners. Thus the basis for exclusion was that petitioners favored tax limitation. The basis for entry was that the proposed party disfavored tax limitation. Under Art. V, Sect. 3(b) of the Florida Constutition the order denying party status in an original action brought in the appellate court was non-appealable. The Florida courts excluded petitioners and limited party status to the announced opponent of the amendment, Martin Fine, and the tacit opponent of the amendment, George Firestone, Secretary of State of Florida. The deprivation of petitioner's right to be

heard in defense of the amendment in a manner equal to that right to be heard extended to those opposing the amendment denied petitioners equal protection of the law. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

QUESTION II

WHETHER DESTRUCTION OF THE BALLOT STATUS OF THE CONSTITUTIONAL AMENDMENT SPONSORED BY PETITIONERS IN LITIGATION IN WHICH PARTY STATUS TO DEFEND THE AMENDMENT WAS LIMITED TO THE FLORIDA SECRETARY OF STATE WHO OPPOSED THE AMENDMENT, AND WHO MADE NO DEFENSE, AND WHO FACILITATED DESTRUCTION OF THE BALLOT STATUS DEPRIVED PETITIONER OF DUE PROCESS OF LAW UNDER THE XIV AMENDMENT OF THE U. S. CONSTITUTION.

The petitioners were deprived of their substantial rights in the ballot status obtained for their tax limiting ideology by proceedings in which they were excluded from party status and limited to the nominal role of an amici curiae. The petitioners in being limited to this role were prevented from

taking an appeal or seeking review in the U. S. Supreme Court. Winter Haven v. Gillespie, 84 F.2d. 285 (Fla. 1936). Amici can not challenge the validity of the original action, 236 A.2d. 327 (Pa. 1970). He cannot raise new issues. Keating v. State, 157 So.2d. 567 (Fla. App.)

Because of these limits on his participation the amici are unbound by the decision Arkla Exploration Co. v. Watt, 548 F. Supp. 466; Aero-Jet General v. Askew, 511 F.2d. 710 (5th Cir. 1978); Holt v. Virginia, 381 U.S. 131 (1965) establishes that procedural due process requires that a person sought to be affected by the proceedings have the right to raise issues, set up defenses, and file motions. The traditional denial of these rights to petitioners combined with the circumstances of denying them the power to seek U.S. Supreme Court review denied them

procedural due process which is traditionally remedied by imposing amicus status only on those who will be unaffected by the final decision.

Petitioners, being limited by the Florida courts to amicus status were effectively denied those powers needed to properly litigate their protected interest in the candidacy of their creed. The candidacy being that of a concept rather than an individual, the inanimate candidate could only be defended by others and as shown in the Statement of Facts there was no defense by others once petitioners are the only parties in interest seeking to defend the suit were excluded by being limited to the nominal role of amicus curiae. Petitioners lost their substantive right in the ballot position of their creed. The right was obtained by the action of petitioners in

expending large sums of money and effort to obtain 600,000 signatures supporting an amendment which polls revealed had overwhelming popular support. The right was lost in a state judicial proceeding in which only those in opposition to the amendment were permitted to appear as a party. Straw man litigation was used to wrongfully deprive non-parties of a substantive right belonging solely to them. See Aerojet-General Corp. v. Askew, 511 F.2d. 710 (5th Cir. 1975).

QUESTION III

DID THE COMBINATION OF THE CIRCUMSTANCES INVOLVING DENIAL OF PARTY STATUS TO ALL WISHING TO DEFEND THE BALLOT POSITION OF THE CONSTITUTIONAL AMENDMENT WITH THAT OF RETRO ACTIVELY APPLYING MODIFICATION OF THAT INTERPRETATION OF WRITTEN LAW RELIED ON BY THE PETITIONERS IN MAKING LARGE EXPENDITURES TO ACHIEVE A BALLOT POSITION REACH THAT POINT OF FUNDAMENTAL UNFAIRNESS SUFFICIENT TO CAUSE A DENIAL OF THAT DUE PROCESS OF LAW PROVIDED BY THE XIV AMENDMENT OF THE U. S. CONSTITUTION.

The case of Griffin v. Burns, 570 F.2d. 1065 (1st Cir. 1978) holds that state election practices under some circumstances operated so unfairly as to constitute a denial of due process. Such case found a

retroactive application of a judicial ruling to invalidate absentee votes previously cast to be so unfair as to constitute a denial of due process under circumstances where the affected voters were denied intervention at the state level. The court noted:

> Prompt objection to quashing the ballots was made in federal court by the voters; and the federal court acted only after they were refused permission to intervene in the state court proceeding.... And the federal court was the only practical forum for redress; there appears to have been no standard state procedure for handling a claim such as this, and the state court did not confront the questions that retroactive application of its ruling would create.

570 F.2d. at 1970 (emphasis supplied).

Duncan v. Poythress 657 F.2d. 691 (5th Cir. 1981) adopts the principal of Griffin supra and holds the states' unfair by-passing of the election process by a conspiracy to create an office vacancy in a manner which will require an appointment of a replacement was so unfair as to deny due process of law

wrongfully. State action through the judiciary are subject to federal correction in litigation between private parties. See Shelley v. Kraemer, 334 U.S. 1 (1947). The Duncan opinion makes the following concrete analysis of the due process weighing of fairness.

> This case brings before us a question heretofore unanswered in the Fifth Circuit whether the due process clause of the fourteenth amendment offers protection against those rare, but serious, violations of state election laws that undermind the basic fairness and integrity of the democratic system. Although we recently decided that the fourteenth amendment provides no guarantee against innocent irregularities in the administration of state elections, we were not required to determine when state

election practices "may operate so unfairly as to constitute a denial of ... due process...." Gamza v. Aguirre, 619 F.2d. 449, 454 n. 6 (5th Cir., 1980) (citing Griffin v. Burns, 570 F.2d. 1065, 1078-79 (1st Ciir. 1978) and Briscoe v.Kusper, 435 F.2d. 1046 (7th Cir. 1970)). The approach which we adopted in Gamza, however, and the guidance offered by cases such as Griffin and Briscoe, point the way to our holding today that the due process clause of the fourteenth amendment prohibits action by state officials which seriously undermine the fundamental fairness of the electoral process.

657 F.2d. at 699-700.

Despite this broad authority enjoyed by

the states over the scope and conduct of elections, the federal courts have not hesitated to interfere when state actions have jeopardized the integrity of the electoral process. Of ccurse, most cases of federal court intervention have been brough under the fourteenth amendment's equal protection clause and concerned the purposeful denial, or dilution, of the voting rights of a segment of the electorate. In Bell v. Southwell, 376 F.2d. 659 (5th Cir. 1967), for instance, this court voided a state election and ordered a special election--with full recognition of the " d rastic, if not staggering" nature of this relief--because racially discriminatory practices in the administration of a local election rose in constitutional significance far above the usual claim of election inrregularities.

Less frequent than such equal protection cases are those instances in which federal courts have intervened instate election matters because of a violation of the fourteenth amendment guarantee of due process. On this ground, the Seventh Circuit has held that section 1983 provides a federal remedy if state officials place a sham candidate on a ballot in order to appoint his successor following his expected victory and pre-arranged resignation. Smith v. Cherry, 489 F.2d. 1098 (7th Cir. 1983), cert. denied, 417 U.S. 910, 94, S. Ct. 2607, 41 L.Ed. 2d 214 (1974), 651 F.2d. 701-702.

The recent case of Anderson v. Celebrezze, 75 L.Ed.2d. 547 (1983) followed a comparable doctrine in finding to be an

unfair burden a state requirement for an independent presidential candidate to file an early declaration of candidacy. The unfair circumstances applicable to petitioners discussed in the prior portion of the brief combine with the following additional factor. The Florida Supreme Court in Humphrey v. State, 145 So. 858 (Fla. 1933) and Florida Forst and Park Services v. Strickland, 18 So.2d. 251 (Fla. 1944) announced that its modification of interpretations of written law would not be retrospectively applied to those who had relied on the former interpretations before the modifications were announced. The proponent and others as verified in the statement of the case expended substantial funds and labor in achieving ballot status for their creed in a form provided in the construction by the Florida Supreme Court

placed on the initiative provision of the Florida Constitution (Art. XI, Sec. 5) by that court's opinion in Weber v. Smathers, 338 So.2d. 819 (Fla. 1971), and Floridians Against Casino Take Over v. Lets Help Florida, 363 So.2d. 337 (1978). The Florida Supreme Court acknowledged that proponents had complied with its rulings in Weber and Floridians, supra, by finding it necessary to modify such opinions in order to divest proponents of that ballot status of their creed already acquired through proponent's exensive activities.

This retroactive application of a ruling was found to be a denial of due process because of gross unfairness in the Griffin case, supra. Petitioners, like the parties in Griffin, supra, also were excluded from the state proceedings. The combination of circumstances far exceed the unfair burden

remedied by the 5 to 4 ruling of this curt in Celebrezze, supra.

CONCLUSION

Since all material testimony and evidence is complete and undisputed, this court can act as the trial court removing the necessity of remanding the case. Proponents request this Court to direct the Secretary to take all action necessary to give Proposition 1 a ballot status in the next general election of Florida, or alternatively, to direct him to hold an early special election.

James G. Mahorner

JAMES G. MAHORNER
Suite 210
1020 East Lafayette Street
Tallahassee, Florida 32301
(904) 877-7139

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the Petition for Writ of Certiorari was served by U. S. Mail, Postage Prepaid, this 19th day of December, 1984, on Asst. Atty. General Mitchell Franks, Attorney for the Secretary of State of Florida, The Capitol Building, Tallahassee, Florida.

James G. Mahorner

84-998 (2)

Office-Supreme Court, U.S.
FILED
NOV 26 1984
ALEXANDER L. STEVAS,
CLERK

CASE NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

ROBERT E. GIBSON, et al,

Petitioner,

vs.

GEORGE FIRESTONE,

Respondent.

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
APPENDIX

James G. Mahorner
Attorney for Petitioner
1020 East Lafayette Street
Tallahassee, Florida 32301
Phone: (904) 656-3591

67 pp

CASE NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

ROBERT E. GIBSON, et al,

Petitioner,

vs.

GEORGE FIRESTONE,

Respondent.

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
APPENDIX

James G. Mahorner
Attorney for Petitioner
1020 East Lafayette Street
Tallahassee, Florida 32301
Phone: (904) 656-3591

APPENDIX INDEX

PAGE NO.

Reference

U. S. District Court.....29

Complaint (1 C 4).....Count & Paragraph

U. S. District Court

Intervenor Complaint and Motion.....48

U. S. District Court Opinion.....67

U. S. Circuit Court Opinion.....79

UNITED STATES DISTRICT COURT COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE DIVISION

ROBERT E. GIBSON,	:	
Plaintiff	:	
vs.	:	CASE NO. TCA 84-7168-WS
GEORGE FIRESTONE,	:	
individually and as	:	
Secretary of State of	:	
the State of Florida	:	
and MARTIN FINE,	:	
Defendants.	:	

COMPLAINT

COUNT I

The Complaint of Robert E. Gibson respectfully represents:

1. This is an action for injunctive

relief and this Court has jurisdiction under 42 U.S.C. 1331(a), 2343(3), 1983, and the provisions of Art. I, Section 10 and the First and Fourteenth Amendments of the United States Constitution.

2. Plaintiff, Robert E. Gibson, signed the Petition which caused the Defendant, George Firestone, Secretary of State of the State of Florida to certify that the proposed amendment to the Florida Constitution, designated Proposition 1, as having met the State Constitutional requirement for placement on the November ballot for the 1984 Florida General Election. A copy of said certification is attached hereto as Exhibit "1". Plaintiff has expended substantial funds and labor as a strong supporter of the proposed amendment and the limits it places on the government's ability to extract from its citizens the harvest of their labors as

is evidenced by his instituting this Court's case number TCA 84-7109 MMP and as extensive participant in the minor non-party roll ofamicus curiae in the State courts.

3. Defendant, Martin Fine, brought suit against the Defendant, George Firestone, in the First District Court of Appeal of Florida seeking to have the proposed amendment struck from the ballot. Defendant, George Firestone, then publicly acclaimed the virtues of the suit brought by Defendant, Martin Fine and further assisted Martin Fine in his quest by consenting to the issuance of the Order to Show Cause, declining to defend on the merits, neither filing briefs or participating in oral argument nor in any other manner opposing the legal attack made by Defendant Fine. Attached as Exhibit "2" is the complete response made by Defendant, Firestone.

4. Plaintiff and others who supported Proposition 1 sought to intervene so as to obtain party status in the case and were summarily denied the same in this case which was to decide their rights to vote on constitutional initiative proposals even though there was no party who supported such rights. (Plaintiff was permitted the status of amicus curiae.)

5. The District Court, by the attached Opinion, Exhibit "3", found the proposal to meet the State Constitutional requirements against the announced position of both parties to the case.

6. The Petition for Review by Defendant Martin Fine was filed in the Florida Supreme Court by his attorney who was a recent member of such body and who persuaded his former colleagues to enter the Opinion granting mandamus (attached as Exhibit "4") and

depriving Plaintiff all rights to vote on the candidacy of Propositon 1. (Plaintiff acknowledges that the many laws in the Federal and State's jurisprudence which prohibit early appearance before an agency by one previously having status with such agency have no direct application to the courts of Florida).

7. Plaintiff had no party status and since both Defendants, who opposed Proposition 1, were the sole parties in the cause, there was no possibility for the filing of a petition for rehearing, for the taking of an appeal, nor for the filing of motions attacking jurisdiction and other issues which could have been raised by a party to the case.

8. Plaintiff had, upon the certification by the Defendant, Firestone, the Federally protected voting right to cast his vote for

the candidacy of Proposition 1 and to have its limitation upon government's expropriation of his labor's harvest to become law if the majority of the citizens agreed with him. Plaintiff and others responsible for placing the amendment on the ballot are the only candidates. Plaintiff's right to be a candidate is protected by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. Said rights were summarily terminated without procedural due process and are presently being denied.

Plaintiff was deprived of said rights without procedural due process in a judicial proceeding in which his rights were opposed by all parties to that proceeding.

The Defendant, Firestone, is now directed under color of State law to strike the proposed amendment from the ballot

invalidating his previously valid certification under the authority of a nonadversary court action, which he refused to defend, thereby assuring his future emoluments of office without threat of limitation on the power to extract from Plaintiff the support of such benefits.

9. The above-described circumstances disenfranchised Plaintiff of the right to vote for and promote his candidacy of Proposition 1 in violation of the freedom of speech and assembly provisions of the First Amendment and the equal protection and sustantive due process provisions of the Fourteenth Amendment of the United States Constitution. Such disenfranchisement without affording Plaintiff party status violated the procedural due process guaranteed by the Fourteenth Amendment.

10The Florida Supreme Court gave to

Plaintiff a property right in its prior decisions interpreting the initiative provision of the Florida Constitution subject to the condition precedent that he take action in reliance on them stating to him in Florida Forest and Park Service v. Strickland, 18 So.2d. 251, 253 (1944), that it was well recognized that ". . . where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation." (Citing Douglass v. Pike County, 101 U.S. 677, 25 L.Ed. 968) Plaintiff has been deprived without the procedural due process guaranteed by the Fourteenth Amendment of the Federal Constitutions of the property right to have

the amendment constitutional under the prior decisions submitted to the electorate.

Plaintiff's opportunity for success are sufficient to justify a preliminary injunction, the United States Supreme Court and the Fifth Circuit Court of Appeals having held in Aerojet General Corporation v. Askew, 514 F.2d. 1072, appeal dismissed and certiorari denied, 46 L.Ed. 187, rehearing denied, 423 U.S. 1026, that straw man litigation between two parties who favor a single position cannot deprive non-parties of their rights.

11Plaintiff has no adequate remendy at law and injunction and declaratory relief by this Court are the only methods whereby Plaintiff can avoid irreparable injury.

COUNT II

IMPAIRMENT OF CONTRACT

The Complaint of Robert E. Gibson

respectfully represents:

1. Plaintiff restates the assertions of the preceeding Count.

2. This is an action for impairment of rights of contract protected by Art. I, Section 10 of the United States Constitution.

3. The Florida Supreme Court in its Opinion in Humphrey v. State, 145 S. 858 (1933), citing the Federal cases of Douglas v. Pike, 25 L.Ed. 968, Louisiana v. Pillsbury, 26 L.Ed. 109, and Gelpcke v. Dubuque, 17 L.Ed. 520, asserts to Plaintiff and others who take action in reliance on its opinions that it will not apply recission of such opinions to them retrospecively.

4. The Plaintiff and others in reliance on such clear pronouncement through great labor and expenditure of funds promoted the proposed constitutional amendment and gathered over 600,000 petitions, paid to the

State of Florida the sum of $37,000 for checking the names on the petitions and further relied on the fact that it met the State Constitutional requirements as laid down by the Florida Supreme Court in its recent but prior opinions in Floridians Against Casino Take Over v. Let's Help Florida, 363 So.2d. 337 (Fla. 1978) and Weber v. Smathers, 338 So.2d. 819 (Fla. 1976), where in his concurring opinion, Mr. Justice England said:

> ". . . Appellants view it narrowly (the one subject limitation). . . . Appellees view it broadly. . . . Neither offers us any precise historical data as to why this limiting phraseology was selected when it was adopted by the Legislature and submitted to the people for their approval in 1972.

In the absence of guidance from the framers of the phrase, it becomes our responsibility to select one or the other interpretation not only looking back on its development as best we can and with a view to its applicability in this case but as well with a concern for future cases where the right of initiative may be exercised. . . ." (Emphasis supplied).

5. The Secretary of State, Defendant Firestone, approved the form of Proposition 1 prior to circulation of the petition for signature and no legal attack was made during such circulation though such is permitted by Floridians, supra.

6. The approval for circulation by the

Defendant, Firestone, of the form constitutes an offer in the classical form of a unilateral contract to certify Proposition 1 for the ballot and permit the candidacy thereof to receive the vote of the electorate in return for the enormous effort of successfully obtaining sufficient signatures.

7. The unilateral contract with the Defendant and the Court was then impaired in violation of Art. I, Section 10 of the Federal and State Constitutions by the subsequent invalidating of the Weber and Floridians Opinions (which were the guidelines used for Proposition 1 subject limitation) and its retrospective application to the subject of Proposition 1, the subject matter of which resulted from a reliance on the court's representation in Humphrey v. State that it would not retrospectively apply recission of existing established holdings to

those whose rights would be adversely affected because of reliance on the prior court holders before the court invalidated them.

8. The court recognized that the single subject standards required by it had been complied with in Amendment 1 and found that to strike down the proposed amendment it was necessary to recede from its opinions in Weber and Floridians.

9. By its Opinion, the Florida Supreme Court further provided the unprecedented requirement that future amendments must designate each part of the Florida Constitution affected, a requirement not previously found or discernable in the existing Florida Constitution and not followed as to amending the Federal or any other State Constitution, and the Court thereby clearly intends to nullify the

present power of the people and of Plaintiff to amend the Constitution by requiring further amendments to specify the constitutional sections affected, which specification under the standards of the Opinion constitute a second subject rendering future amenments invalid. Thus, the Court has undertaken to prevent Plaintiff from mitigating damage from the impairment of contract by preventing successful submission of a modified amendment.

WHEREFORE, Plaintiff prays as follows:

a. That the Court advance this cause on the docket and hold an early final hearing granting an injunction against the Secretary decertifying Proposition 1 or directing its recertification.

b. That the Court declare that Plaintiff's right to vote on Proposition 1 cannot be affected by the straw man

litigation.

c. That the Court grant an early preliminary injunction consistent with the final injunction requested.

d. That the Court allow Plaintiff his cost herein including reasonable attorney fees.

e. The arbitrary actions described herein has been prior restraint preempted Plaintiff's right to promote the November candidacy of Proposition 1 causing delay in Federal relief to become denial of Federal relief necessitating the immediate injunctive doctrine of National Socialist Party of America v. Village of Skokie, 432 U.S. 43 and reinstatement until decision which creates no harm if the proposition is later stricken.

f. That the Court grant all other relief to which Plaintiff appears entitled.

/S/ JAMES G. MAHORNER
JAMES G. MAHORNER
206 South Monroe Street
Tallahassee, Florida 32302
(904) 222-7735

Attorney for Plaintiff

UNITED STATES DISTRICT COURT

INTERVENOR COMPLAINT AND MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CASE NO. TCA 84-
7168-WS

ROBERT E. GIBSON,

Plaintiff,

vs.

George Firestone, individually
and as Secretary of State
of the State of Florida, and
Martin Fine,

Defendants,

and

Ed Havill, Y. Y. Phillips, Jr.
George Schulte,
Floridians for Tax Relief and
Limit Government Committee,

Intervening Plaintiffs,

vs.

George Firestone, Individually and
as Secretary of State of the State
of Florida, and Martin Fine,

Defendants.

INTERVENING COMPLAINT

Intervening Plaintiffs Ed Havill, Y. Y.

Phillips, Jr., George Schulte, Floridians for Tax Relief, and Limit Government Committee, respectfully represent and allege:

COUNT 1

1. The Complaint in this action, Count 1, paragraphs 1 through 11 is incorporated herein as if fully set forth.

2. Ed Havill, Y. Y. Phillips, Jr., and George Schulte, are citizens, taxpayers and electors of Florida.

3. Ed Havill, Y. Y. Phillips, Jr., and George Shulte, have expended funds and labor in support of the "Citizens' Choice on Government Revenue" proposed Florida Constitutional Amendment 1 which was certified as to ballot position for the November, 1984 general election ballot.

4. Floridians for Tax Relief's an association of Florida citizens, including Ed Havill and others, authorized and required by

Florida law, Section 100.371(3), Fla. Stat., to register as a political committee. It has expended in excess of $ 200,000 and labor in efforts to promote and sponsor Amendment 1.

5. Limit Government Committee is also an association of Florida citizens, including George Schulte and others, which has expended funds and labor to promote and sponsor the adoption of Amendment 1. It is also registered pursuant to Section 100.371(3), Fla. Stat. As the first political committee to file the "Citizens' Choice on Government Revenue" initiative petition with the Secretary of State of Florida, it was designated pursuant to Fla. Admin. Code Section 1C-7.09, as the sponsoring organization of Amendment 1.

6. Pursuant to Florida Constitution, Art. Xl, sec. 5, and law, Section 100.371 Fla. Stat. and Section 1C-7.10, Fla. Admin.

Code., the proposed Amendment 1 was placed on November, 1984 general election ballot in Florida, and can be placed on no other ballot.

7. In the state court proceeding initiated by Defendant Martin Fine the Respondent therein, George Firestone, Defendant herein, stipulated jurisdiction by filing a "Consent to Entry of Show Cause Order" concurrently with Fine's original petition, even though Defendant Firestone had determined not to defend that suit. When Defendant Firestone then filed his response indicating he would not defend, the Intervening Plaintiffs moved to substitute parties in whole or in part, or to add the Intervening Plaintiffs as parties respondent, where upon Defendant Fine opposed the motion to substitute parties.

8. Intervening Plaintiffs' rights to due

process under the Fourteenth Amendment to the United States Constitution were denied because of the non-adversary and sollusary proceeding in th state courts. Motions and demands they expressed an intention to make (motion to dismiss, demand for a jury trial) were made unavailable to them, without even any ruling of denial thereon.

9. Intervening Plaintiffs' rights to equal protection under the Fourteenth Amendment to the United States Constitution were denied them, by the granting of Defendant Fine party status in the state courts (when he alleged he was a "citizen and taxpayer"), while they were denied party status in the same case after allegation they were "citizens, taxpayers and electors" and that they were among the sponsors of Amendment 1. Procedural rights cannot be granted to some litigants and arbitrarily and

capriciously denied to others.

10. The decision of the Florida Supreme Court in Fine v. Firestone on March 27, 1984, was contrary to numerous precedents of that Court, amounted to "issue exclusion" from the ballot, and was content-based discrimination based on the Florida Supreme Court's reading of Amendment 1 to individually classify and restrict Amendment 1 in the pre-election prior restraint stage as to speech and assembly and associational and voting rights (fundamental rights) of the intervening Plaintiffs.

COUNT II

1. The Complaint in this action, Count II, paragraphs 1 through 9, is incorporated herein as if fully set forth.

2. The allegations of the foregoing paragraphs hereinabove are incorporated herein as if fully set forth.

3. Intervening Plaintiffs relied not only on the Weber v. Smathers, 338 So. 2nd 819 (Fla. 1976) and Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2nd 337 (Fla. 1976) cases, but also on numerous decisions of the Florida Supreme Court that that court is bound to follow the established law. Gilliam v. Stewart, 291 So. 2nd 593, 594 (Fla. 1974); Hoffman v. Jones, 280 2nd 431, 433-434 (Fla. 1973); and Dozier v. Wood, 431 So. 2nd 184, 187 (Fla. 1983).

Wherefore, Intervening Plaintiffs incorporate herein and adopt the Complaint prayer, paragraphs a through f, as if fully set forth herein.

Dennis M. O'Connor
Dennis M. O'Connor
University of Miami
Coral Gables, Florida 33124
(305) 665-3934

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing intervening Complaint was mailed this 15th day of May, 1984, to:

Jim Smith, Attorney General of Florida
Attorney for Defendant Secretary of State George Firestone
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32301
(904) 488-1573

Arthur J. England, Jr., Esquire
Attorney for Defendant Martin Fine
Steel, Hector and Davis
1400 Southeast Bank Building
Miami, Florida 33131
(305) 577-2987

Stuart L. Simon, Irwin Block
and Burt Hellman, Esquires
Attorneys for Defendant Martin Fine
Fine, Jacobson, Block, Klein,Colan,
and Simon P.A.
2401 Douglas Road
Miami, Florida 33134
(305) 446-2200

James C. Mahorner, Esquire
Attorney for Plaintiff
206 South Monroe Street
Tallahassee, Florida 32302
(904) 222-7735

Dennis M. O'Connor, Attorney

UNITED STATES DISTRICT COURT OPINION

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

Robert E. Gibson, CASE NO. TCA 84-7168-WS
Plaintiff,
vs.
George Firestone, Individually and as Secretary of State of the State of Florida, and Martin Fine,
Defendants
and
Ed Havill, .Y.Phillips, Jr., and George Schulte,
Floridians for Tax Relief, and Limit Government
Committee,
Intervening Plaintiffs,
vs.
George Fireston, Individually and as Secretary of State of the State of Florida, and Martin Fine,
Defendants,

INTERVENING COMPLAINT

Intervening Plaintiffs Ed Havill, Y. Y. Phillips, Jr., George Schulte, Floridians for Tax Relief, and Limit Government Committee, respectfully represent and allege:

COUNT 1

1. The Complaint in this action, Count 1, paragraphs 1 through 11 is incorporated

herein as if fully set forth.

2. Ed Havill, Y. Y. Phillips, Jr., and George Schulte are citizens, taxpayers and electors of Florida.

3. Ed Havill, Y. Y. Phillips, Jr., and George Schulte, have expended funds and labor in support of the "Citizens' Choice on Government Revenue" proposed Florida Constitutional Amendment 1 which was certified as to ballot position for the November, 1984 general election ballot.

4. Floridians for tax relief is an association of Florida citizens, including Ed Havill and others, authorized and required by Florida law, Section 100.371(3), Fla. Stat., to register as a political committee, It has expended in excess of $200,000 and labor in efforts to promote and sponsor Amendment 1.

5. Limit Government Committee is also an association of Florida citizens, including

George Schulte and others, which has expended funds and labor to promote and sponsor the adoption of Amendment 1. It is also registered pursuant to Section 100.371(3), Fla. Stat. As the first political committee to file the "Citizens' Choice on Government Revenue" initiative petition with the Secretary of State of Florida, it was designated pursuant to Fla. Admin. Code Section 1C-709, as the sponsoring organization of Amendment 1.

6. Pursuant to Florida Constitution, Art. XI, sec. 5, and law, Section 100.371 Fla. Stat. and Section 1C-7.10, Fla. Admin. Code., the proposed Amendment 1 was placed on no other ballot.

7. In the state court proceeding initiated by Defendant Martin Fine the Respondent therein, George Firestone, Defendant herein, stipulated jurisdiction by

filing a "Consent to Entry of Show Cause Order" concurrently with Fine's original petition, even though Defendant Firestone had determined not to defend that suit. When Defendant Firestone then filed his response indicating he would not defend, the Intervening Plaintiffs moved to substitute parties in whole or in part, or to add the Intervening Plaintiffs as parties respondent, whereupon Defendant Fine opposed the motion to substitute parties.

8. Intervening Plaintiffs' rights to due proess under the Fourteenth Amendment to the United States Constitution were denied because of the non-adversary and collusary proceeding in the state courts. Motions and demands they expressed an intention to make (motion to dismiss, demand for a jury trial) were made unavailable to them, without even any ruling of denial thereon.

9. Intervening Plaintiffs' rights to equal protection under the Fourteenth Amendment to the United States Constitution were denied them, by the granting of Defendnt Fine party status in the state courts (when he alleged he was a "citizen and taxpayer"), while they were denied party status in the same case after allegation they were "citizens, taxpayers, and electors" and that they were among the sponsors of Amendment 1. Procedural rights cannot be granted to some litigants and arbitrarily and capriciously denied to others.

10. The decision of the Florida Supreme Court in Fine v. Firestone on March 27, 1984 was contrary to numerous precedents of that Court, amounted to "issue exclusion" from the ballot, and was content-based discrimination based on the Florida Supreme Court's reading of Amendment 1 to invidously classify and

restrict Amendment 1 in the pre-election prior restraint stage as the speech and assembly and associational and voting rights (fundamental rights) of the Intervening Plaintiffs.

COUNT II

1. The Complaint is this action, Count II, paragraphs 1 through 9 is incorporated herein as if fully set forth.

2. The allegations of the foregoing paragraphs hereinabove are incorporated herein as if fully set forth.

3. Intervening Plaintiffs relied not only on the Weber v. Smathers, 338 So. 2d 819 (Fla. 1976) and Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337 (Fla. 1976) cases, but also numerous decisions of the Florida Supreme Court that that court is bound to follow the established law. Gilliam v. Stewart, 291 So. 2d 593, 594

(Fla. 1974); Hoffman v. Jones, 280 So.2d 431, 433-434 (Fla. 1973); and Dozier v. Wood, 431 So.2d 184, 187 (Fla 1983).

WHEREFORE, Intervening Plaintiffs incorporate herein and adopt the Complaint prayer, paragraphs a through f, as if fully set forth herein.

Dennis M. O'Connor
Dennis M. O'Connor P.A.
c/o School of Law-Box 8087
University of Miami
Coral Gables, Florida 33124
(305) 665-3934

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this Intervening Complaint was mailed by Express Mail May 12, 1984 to :

Jim Smith, Attorney General of Florida
Attorney for Defendant Secretary of

State George Firestone
Mitchell D. Franks, Chief Trial Counsel
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32301
(904) 488-1573

and by U. S. first class mail to:

Arthur J. England, Jr., Esquire
Attorney for Defendant Martin Fine
Steel, Hector & Davis
1400 Southeast Bank Building
Miami, Florida 33131
(305) 577-2987

Stuart L. Simon, Irwin Block, and
Burt Hellman, Esquires
Attorneys for Defendant Martin Fine
Fine, Jacobson, Block, Klein, Colan,

and

Simon P.A.

2401 Douglas Road

Miami, Florida 33134

(305) 446-2200

_____

Dennis M. O'Connor, Attorney

OPINION
UNITED STATES DISTRICT COURT
FOR NORTHERN DISTRICT OF FLORIDA

Now whether or not that's desirable as a condition or proviso for initiative amendments is not something I'm addressing. I simply say the Florida Constitution doesn't contain that proviso. It is a proviso issued by the Florida Supreme court in the March 27th opinion. And that peg, we think, does give grounds for appeal for a party in that case. We can assure you that George Firestone won't appeal, Martin Fine won't appeal. And so the denial of whatever Federal rights our Plaintiffs have esentially is left in limbo by the March 27th Florida Supreme Court opinion. The only way their rights could be vindicated, Your Honor, is by a Federal Court recognizing that there are Federal rights.

THE COURT: And do what?

MR. O'CONNOR: Simply declare that the Fine versus Firestone proceeding is a

nullity and, therefore, Amendment 1 remains on the ballot.

(Discussion off the record)

THE COURT: Okay. Is that it, sir?

MR. O'CONNOR: Direct the Secretary of State, that is George Firestone, to leave it on the ballot is essentially what I was saying. That's all.

THE COURT: All right.

(Discussion off the record)

THE COURT: Under Rule 52 (a) of the Federal Rules of Civil Procedure, this will constitute the Court's decision in this case, reserving to the Court the right to modify this by subsequent written order either on my own initiative or as a result of a motion for reconsideration. But I announce the decision today because the original Plaintiff in this case, Robert E. Gibson, filed this action in this court on April 27th and asked that this

Court move this case along by advancing it on the docket and holding an early final hearing.

So, as I previously told you in this hearing, that order of mine, April 30th, set this case for final hearing. And the Intervening Plaintiffs, of course, came into the case with full knowledge of the schedule. I realize, Mr. O'Connor, that the Attorney General has filed a recent Motion to Dismiss, Motion for Summary Judgment, and you have asked for some time to be heard on that. I would give you a short period of time to respond, and I would treat that in this regard, as a motion for reconsideration, in view of the ruling that I think I must announce in this case.

Now, this matter is before me asserting some denial of a party status in the Florida courts and alleges consequent

denial of several Federally-protected rights. And so I'm called upon to determine whether the Plaintiffs have stated a case under the situation that would give them right to be heard in this court.

What this court is not called upon to determine is whether the proposition 1 is good or bad. I merely decide the issues that have been presented before me.

Now this case, then, came on today for final hearing and I have heard the evidence that the parties have to present. The file in this case is already substantially thick. The parties, I believe, have set forth their legal positions, I think, rather clearly and sometimes, repetitively, so I think I know the legal position taken by each of you in this case, subject, of course, Mr. O'Connor, to your right to respond to the Defendant's Motion to

Dismiss and Motion for Summary Judgment. But my view of the evidence and the law as I must apply it is that the Plaintiffs have not suffered the denial of any Federally-protected right. I say that because there is no property right in hving the amendment declared constitutional. There is no right to vote on the amendment. There is no violation of equal protection of the First Amendment or substantive due process.

Now, even if this Court were to find that the Plaintiffs had stated a cause of action for denial of a Federally-protected right, which I suggest would be stretching legal reasoning, the Court is unable to conclude how the actions of the Defendant Firestone could have operated to deny these rights.

Now, any supposed right of the Plaintiffs to participate in the judicial

process was denied by the Florida courts and not the Defendant Firestone before this Court today. Firestone did not oppose Gibson's intervention as a party in the First District Court of Appeals. And no claim can lie against him, that is Firestone, for the DCA as failure to allow Gibson party status.

Plaintiff Gibson did not even request party status before the Florida Supreme Court, nor did he attempt to appeal the denial of party status to the Florida Supreme Court.

Now, what the Plaintiff Gibson now seeks in this court is an appeal of the First District's denial of party status. And also the Intervening Plaintiffs have made the same contention. Plaintiff Gibson has not stated a causal connection between the actions of Firestone and the denial of his party status. I, therefore, feel that this count

could be dismissed for failure to state a claim.

What is in reality an attempted appeal of a decision of the highest court of a sovereign state is brought before me in this court in the guise of an alleged infringement by the Florida Supreme Court of an implied contract between the Defendant Firestone and the Plaintiff. I think the simple answer to this is that no such contract existed. To hold that the Defendant Firestone, by certifying the form of a proposed constitutional amendment thereby entered into a contract to place the amendment on the ballot, would be hold the Florida Supreme Court lacks the power to review the content of the proposed amendment for compliance with the State Constitution. In my judgment, this is an untenable position. There being no contract between

the Plaintiffs and the Defendant Firestone, there is no set of facts under which Plaintiff could prevaill, not even a conceivable set of facts under which the Plaintiff could prevail.

Even assuming that such a contract existed, Defendant Firestone, the only Defendant in this court, is not accountable for the Florida Supreme Court's supposed interference with this alleged contract. In my judgment, Count II should be dismised for failure to state a claim upon which relief may be granted.

Now Counsel, I know all of you are interested in a quick resolution of this matter. I think you have presented to me your positions. I have announced to you what my ruling will be, and that is that the Plaintiff in this case, both the Plaintiff Robert Gibson and the Intervening Plaintiffs,

Ed Havill, Y. Y. Phillips, Jr. George Schulte, Floridians for Tax Relief, and Limit Government Committee will take nothing by this action, and judgment in this case will be for the Defendant George Firestone. That will be the Court's ruling.

As I have previously announced, I may modify this by a written order either expanding upon or modifying those findings as announced in the record. But I give it to you now because whatever action you are going to ake, I think you need to make your plans, and I think you are entitled to a quick ruling by this Court, and I have given it to you.

I will wait until -- Mr. O'Connor, when do you suppose you will have that response in, sir?

MR. O'CONNOR: I can have it in by Wednesday, Your Honor. Due to the holiday,

it's a little difficult to --.

THE COURT: If you can get it in by Wednesday or Thursday of next week, that will be fine.

MR. O'CONNOR: All right.

THE COURT: As I say, I will treat it, because of the shortness or the late time in which you were -- Mr. Franks moved on this thing, I would --.

MR. O'CONNOR: As a motion to reconsider?

THE COURT: Yes, sir.

Now, does anybody have any questions?

MR. FRANKS: Your Honor, as part of our motion, we have asked for costs and fees in this action, and would ask that after Mr. O'Connor has had an opportunity to respond to our motion, that you also consider awarding the Defendants costs and fees to include attorney fees.

THE COURT: Well, you submit whatever documentation you have, request and itemization of those, and I will consider it.

MR. FRANKS: Thank you, sir.

THE COURT: Anybody have any questions over here?

MR. MAHORNER: No, sir.

THE COURT: Being nothing further, this hearing is concluded. Court is adjourned.

MR. MAHORNER: Judge, we would like to thank you for hearing this case so quickly. Thank you.

THE COURT: Sure. You are welcome.

(Hearing concluded at 6:06 p.m.)

* * *

UNITED STATES DISTRICT COURT OPINION

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 84-3422

ROBERT E. GIBSON,
Plaintiff - Appellant,

and

ED HAVILL, et al.,
Intervening Plaintiffs-Appellants,

v.

GEORGE FIRESTONE, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Florida

(August 28, 1984)

Before: HILL and HENDERSON, Circuit Judges, and WISDOM*, Senior Circuit Judge.

HILL, Circuit Judge:

*Honorable John Minor Wisdom, U. S. Circuit Judge for the Fifth Circuit, sitting by designation.

This appeal touches upon a wide variety of complex and important issues, one of which proves to be dispositive of the dispute: did the district court abuse its discretion in refusing to enjoin the Florida Secretary of State from complying with the Florida Supreme Court's mandate to remove from the upcoming general ballot a proposed constitutional amendment that the Florida Supreme Court fould violative of the state constitution. We are unable to conclude that the district court abused its discretion in denying appellants' injunctive relief. Hence, we affirm.

An elucidation of the facts illustrates the difficult position in which appellants find themselves and the reasons why the federal courts are not empowered to remedy their plight. Appellants expended substantial sums in organizing support for a

proposed amendment to the Florida Constitution.[1] After acquiring the necessary signatures of 600,000 state electors, appellants submitted their citizens initiative petition to the Florida Department of State for verification. The Secretary of State, finding that the petition satisfied the format requirements of state law, issued a Certificate of Ballot Position to the proposed amendment, certifying it for placement on the November 1984 general election ballot.

Shortly after the Secretary of State certified the amendment, an action was filed in the Florida District Court of APpeals seeking its removal.[2] The suit named

[1]The proposed amendment is set out and discussed more fully by the Florida Supreme Court in its decision holding the amendment unconstitutional. See Fine v. Firestone, 448 So.2d. 984 (Fla. 1984).

[2]Martin Fine instituted the action in

Secretary Firestone as the defendant in interest and requested the Florida appellate court to issue a writ directing Secretary Firestone to remove the proposed amendment, primarily on the grounds that the proposal violated the state constitution's single-subject requirement for constitutional amendments. See Fine v. Firestone, 443 So.2d. 253, 256-57 (Fla. Dist. Ct. App. 1983).

Appellants then sought to intervene in the proceedings before the Florida District Court of Appeal. Arguing that Secretary Firestone has publicly voiced opposition to

the Florida appellate court. Although appellants named Fine as a defendent in their federal court suit, the district court dismissed Fine shortly before the final hearing on Secretary Firestone's motions to dismiss and for summary judgment. Appellants have not challenged that ruling; the record does not otherwise disclose the nature of Fine's interest in the outcome of this litigation.

the proposed amendment and had filed a response disclaiming any intention of supporting the merits of the proposal, appellants asserted their right to intervene as the real parties in interest. Although Secretary Firestone did not oppose appellants' motions to intervene, the state appellate court denied them party status but granted them lave to appear as amici curiae.

The Florida District Court of Appeal ultimately ruled that extraordinary relief was not available to direct the Secretary to remove the proposed amendment. Fine v. Firestone, 443 So.2d. at 255-56. However, the appellate court elected to certify the case to the Florida Supreme Court because questions of great public importance were presented.[3]

[3]The appellate court opined that the proposed amendment was sound under Florida law. In particular, the court reasoned that

The Florida Supreme Court accepted jurisdiction and ordered the proposed amendment removed from the general ballot. Fine v. Firestone, 448 So.2d 984, 993 (Fla. 1984). The court held that mandamus was an appropriate means for testing the constitutionality of the proposal, id. at 987, and that the amendment violated the state constitution's prohibition against multiple-subject constitutional amendments, id. at 987-93. Significantly, the court addressed only the state constitutional issue[4] and rested its decision entirely on its reading of article XI, section 3 of the

the proposal was not subject to attack under the single-subject provisions of the state constitution, see Fla. Const. art. XI, section 3, because the Florida Supreme Court had indicated that the provision was to be read broadly and with a pragmatic approach. See 443 So.2d at 256-57.

[4]The Court did not consider whether the proposal ran afoul of federal due process standards. See Id. at 986 n.1.

Florida Constitution. Id. at 987.[5]

Appellants then filed the present suit in the United States District Court for the Northern District of Florida claiming that the state proceedings in which they were refused leave to intervene deprived them of their right to vote, violated their rights to due process and equal protection and impaired their contract rights under art. I, section 10 of the U.S. Constitution. The complaint alleged jurisdiction under 28 U.S.C. section 1331(a) and 1343(3), 42 U.S.C. section 1983 and art. I, section 10 and the First and Fourteenth Amendments of the U. S. Constitution, and in its prayer for relief, requested the district court to grant an

[5]While appellants did not seek leave to appear before the Florida Supreme Court, perhaps because the appellate court upheld the proposal, they did proceed as amici at the behest of the court. Thus, the state courts had the benefit of appellants' arguments throughout the state proceedings.

"injunction against the Secretary('s) decertifying Proposition 1 or directing its recertification." The district court granted appellants' request for an advanced final hearing on their motion for injunctive relief and, after conducting such hearing, held that appellants had failed to state a claim on which relief could be granted. Appellants now appeal.

Our task is two-fold. First, we must consider whether the allegations stated in the complaint are sufficient to invoke the limited jurisdiction of the federal courts. Second, we must decide whethe appellants have stated a claim on which relief can be granted such that the district court abused its discretion by denying injunctive relief on that ground. To summarize our conclusions, we hold that the complaint properly invoked the subject matter jurisdiction of the

federal courts; however, appellants have not stated a claim on which relief could be granted. Thus, the denial of injunctive relief does not constitute an abuse of discretion.

I. JURISDICTION

Appellee questions whether the federal courts have jurisdiction to consider the claim stated by appellants' complaint. Federal subject matter jurisdiction is determined by the face of the well-pleaded complaint. Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 127-28 (1974); Gully v. First National Bank in Meridian, 299 U.S. 109, 112-13 (1936). Further, all well-pleaded allegations must be taken as true for purposes of determining the existence of federal jurisdiction. See Goosby v. Osser, 409 U.S. 512, 521 n.7 (1973) (citing authorities).

Here, appellants have alleged a deprivation of their first amendment right to vote as well as their fourteenth amendment rights to due process and equal protection. See Record on Appeal at 6 and 80. These allegations, whether sufficient to state a claim for relief, are adequate to invoke federal subject matter jurisdiction. See Goosby v. Osser, 409 U.S. at 521-22. Thus, we find that appellants have stated a claim that is cognizable under 28 U.S.C. section 1343 (3), the jurisdictional counterpart of 42 U.S.C. section 1983.[6]

II. INJUNCTIVE RELIEF

The relief requested of the district court was an order "granting an injunction

[6]Because both parties have impressed upon this court the need for an early disposition of this appeal, we abbreviate our discussion of the jurisdictional issue and proceed to consider the merits of appellants' claims.

against the Secretary('s) decertifying Proposition 1 or directing its recertification." Record on Appeal at 11.[7]

[7] Appellants also asked the district court to "declare that (their) right to vote on Proposition 1 cannot be affected by straw man litigation." Record on Appeal at 11. In essence, appellants claimed that the state proceedings were non-adversarial, because Secretary Firestone declined to defend the merits of the proposed amendment, and, therefore, that the Florida Supreme Court decision should be declared void. See Record on Appeal at 152-54.

In a quite different context, this court has recognized that principle that a judgment produced by nonadversarial proceedings is a mere form and not binding on other courts. See Aerojet-General Corp. v. Askew, 511 F.2d 710, 720-21 (5th Cir. 1975) (analyzing precedents). Aerojet-General, however, involved state proceedings instituted to avoid the effect of a federal court decision adjudicating title to land in Florida. Noting that the Deputy Attorney General for the state had admitted the nonadversarial nature of the state court proceedings, the Fifth Circuit held that it was not obligated to follow the state court ruling in favor of the federal court defendant. Id. at 7821. The present case, unlike Aerojet-General does not turn on whether the prior state court decision is entitled to res judicate effect. Appellants were not parties to the proceedings in state court and cannot be bound by any judgment rendered there.

The Griffin Court analogized to Briscoe v. Kusper, 435 F.2d. 1046 (7th Cir. 1970). In Briscoe candidate nominating papers for city alderman elections were invalidated by the Chicago Board of Election Commissioners on the day before the scheduled election. The commissioners struck certain nominations on the ground that they contained improper duplicate signatures and failed to include middle initials for signatures on the accompanying petitions. In doing so, the commissioners announced a sharp break from

Absent an argument that the district court was bound by the Florida Supreme Court decision, appellants had no grounds for requesting the court to declare tha decision void. Federal courts have no appellate review authority over judgments of state courts. See, e.g., Chicago, R. I. & P. R. R. v. Stude, 346 U.S. 574, 580-81 (1954); Reynolds v. Georgia, 640 F.2d. 702, 703 (5th Cir.), cert. denied, 454 U.S. 865 (1981). For this reason, appellants could only request injunctive relief; no declaration that the Florida Supreme Court's decision was void was available.

prior policy and effectively precluded the candidacies of those who had relied on earlier Board interpretations. Under these circumstances, the Seventh Circuit held that candidates and voters had been unconstitutionally denied the right to participate in aldermanic elections by the last minute policy shift. The court declared those practices violative of the first and fourteenth amendments and enjoined the future use of such procedures. Id. at 1048, 1058.

Appellants argue that Griffin and Briscoe are indistinguishable from the present case, but we find two important distinctions. First, the federal rights vindicated by the First

MOTION FILED
JAN 4 1985

(3)

CASE NO. 84-998

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

ROBERT E. GIBSON, et al,

Petitioner,

vs.

GEORGE FIRESTONE,

Respondent.

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

and

ACCOMPANYING AMICUS CURIAE BRIEF

Joseph W. Little
Attorney for Amicus Curiae
3731 N.W. 13th Place
Gainesville, FL 32605
904-392-2211

CASE NO. 84-998

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

ROBERT E. GIBSON, et al,

Petitioner,

vs.

GEORGE FIRESTONE,

Respondent.

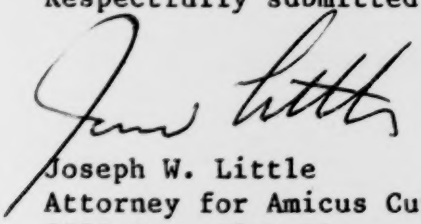
MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. Movant requests leave to file the attached amicus curiae brief in support of the petition for writ of certiorari.

2. Both Petitioners and Respondent have consented to the filing of this brief.

3. Movant, Joseph W. Little, a member of the Florida Bar and the Bar of the Supreme Court of the United States, filed amicus curiae briefs in support of Petitioners in the state court proceedings below and was denied an opportunity to argue before the Florida Supreme Court.

Respectfully submitted,



Joseph W. Little
Attorney for Amicus Curiae
3731 N.W. 13th Place
Gainesville, FL 32605
904-372-5955

Joseph W. Little
Attorney for Amicus Curiae
3731 N.W. 13th Pl.
Gainesville, FL 32605

CASE NO. 84-998

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

ROBERT E. GIBSON, et al,

Petitioner,

vs.

GEORGE FIRESTONE,

Respondent.

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Joseph W. Little
Attorney for Amicus Curiae
3731 N.W. 13th Place
Gainesville, Florida 32605

TABLE OF CONTENTS

	PAGE(s)
Table of Authorities.....	ii
Statement of Case.....	iii
Argument.....	1
DID THE COMBINATION OF THE CIRCUMSTANCES INVOLVING DENIAL OF PARTY STATUS TO ALL WISHING TO DEFEND THE BALLOT POSITION OF THE CONSTITUTIONAL AMENDMENT WITH THAT OF RETRO ACTIVELY APPLYING MODIFICATION OF THAT INTERPRETATION OF WRITTEN LAW RELIED ON BY THE PETITIONERS IN MAKING LARGE EXPENDITURES TO ACHIEVE A BALLOT POSITION REACH THAT POINT OF FUNDAMENTAL UNFAIRNESS SUFFICIENT TO CAUSE A DENIAL OF THAT DUE PROCESS OF LAW PROVIDED BY THE XIV AMENDMENT OF THE U.S. CONSTITUTION.	
Summary of Argument.....	14
Conclusion.....	15
Certificate of Service.....	16

TABLE OF AUTHORITIES

Cases **PAGE(s)**

Adams v. Gunter, 238 So.2d 824 (Fla. 1970)..... 6

Brinkerhoff - Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed 1107 (1930)..... 2,10,11,15

Fine v. Firestone, 448 So.2d 984 (Fla. 1984)..... 2,4,5,9

Fine v. Firestone, 443 So.2d 253 (Fla. App. 1, 1983)..... 2

Floridians Against Casino Takeover v. Let's Help Florida, 363 So.2d 337 (Fla. 1978)..... 7,8

Shelly v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed 1161 (1948)..... 2

Weber v. Smathers, 338 So.2d 819 (Fla. 1976)..... 6

Constitutions

Article XI, section 3, 1968 Florida Constitution..... 5,6

Statement of Case

Amicus Curiae accepts the statement of the case propounded by Petitioners, as augmented in the Argument section below.

Although Petitioners raised three questions in this Court, this Amicus Curiae brief will consider only Question III, phrased as presented by Petitioners.

ARGUMENT

DID THE COMBINATION OF THE CIRCUMSTANCES INVOLVING DENIAL OF PARTY STATUS TO ALL WISHING TO DEFEND THE BALLOT POSITION OF THE CONSTITUTIONAL AMENDMENT WITH THAT OF RETRO ACTIVELY APPLYING MODIFICATION OF THAT PETITIONERS IN MAKING LARGE EXPENDITURES TO ACHIEVE A BALLOT POSITION REACH THAT POINT OF FUNDAMENTAL UNFAIRNESS SUFFICIENT TO CAUSE A DENIAL OF THAT DUE PROCESS OF LAW PROVIDED BY THE XIV AMENDEMENT OF THE U. S. CONSTITUTION.

[Question III raised by Petitioners]

This case raises the question of whether the judicial actions of the Florida Supreme Court in the proceedings below deprived Petitioners of due process of law, consequently entitling them to the relief sought in this action. This Court has held on numerous occasions that judicial acts of state courts may constitute a denial of due

process in exceptional circumstances. Shelley v. Kraemer, 334 U.S. 1, 15, 68 S.Ct. 836, 842, 843, 92 L.Ed. 1161 (1948). As succinctly stated in Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680, 50 S.Ct. 451, 454, 74 L.Ed. 1107, "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government." The facts stated by Petitioners as augmented by the brief history below amply demonstrate this to be an exceptional example of judicial abuse of the federally protected right of due process, and not merely a harmless, in-the constitutional sense, case of a state court's overruling of precedent.

In Fine v. Firestone, 448 So.2d 984 (Fla. 1984), the decision of the Florida

Supreme Court challenged in this petition, the Florida Supreme Court openly changed the criteria that citizens must satisfy in obtaining signatures on petitions to place an initiative to amend the state constitution upon the ballot. In reliance upon the established criteria, laid down by the Florida Supreme Court, Petitioners expended great sums of money and amounts of energy and time to obtain more than 600,000 signed petitions from registered Florida voters, had them certified as true signatures by the various county supervisors of election in Florida, and received final certification from the Florida Secretary of State that the proposal would be placed on the November 1984 general election ballot.

An action was commenced by an objecting citizen in the District Court of Appeal, First District of Florida, to remove the

proposal from the ballot. Despite the refusals of the Florida Secretary of State and Florida Attorney General to defend the right of the proposal to stay on the ballot and the refusal of the Florida court to grant to Petitioners party status to defend it, the District Court of Appeal applied existing law and refused to remove the proposal from the ballot. Fine v. Firestone, 443 So.2d 253 (Fla. App. 1, 1983). The issue was certified to the Supreme Court of Florida, which reversed, overruling prior cases relied upon by the district court in the process. The Florida Supreme Court held that the "amendment must be removed from the 1984 general election ballot." 448 So.2d at 993.

In so holding, the Florida Supreme Court expressly "receded" from the guidelines laid down by that court itself in prior

cases. 448 So.2d at 989. Petitoners had closely adhered to and relied upon those guidelines in their petition drive, as was expressly acknowledged in the concurring opinion of Justice Shaw, when he said: "In my opinion, if we were to review the present initiative using the standard of review which we announced in Weber and Floridians [the cases overruled], we could only hold that the initiative meets the provisions of Article XI, section 3 and affirm the decision of the district court." 448 So.2d 984.

The recent history of changes in the criteria that must be met by citizen initiatives to amend the Florida constitution begins with the adoption of a new state constitution in 1968. Article XI, section 3 of the 1968 constitution initially stated: "The power to propose amendments to any section of this constitution by initiative is

reserved to the people." In Adams v. Gunter, 238 So.2d 824 (Fla. 1970) the Florida Supreme Court literally construed that provision by holding that an amendment to one section might not "substantially affect any other section or article of the Constitution." Id. at 831. Thereafter, in 1972 the people of Florida amended Article XI, section 3 to its present language, namely:

> The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people, provided that any such amendment shall embrace but one subject and matter directly connected therewith.

The change was from a one section to a one subject limitation.

The broaden preogative retained by the people in the amendment was elaborated by the Florida Supreme Court in Weber v. Smathers, 338 So.2d 819 (Fla. 1976) and, especially,

Floridians Against Casino Takeover v. Let's Help Florida, 363 So.2d 337 (Fla. 1978). In Floridians, the Florida Supreme Court prescribed the following guidelines to test the validity of initiative proposals to amend the constitution:

> First, "the 1972 change [to the initiative amendment process] was designed to enlarge the right to amend the Constitution by initiative petition." Second, the burden upon the opponent [the petitioner in this case] is to establish that the initiative proposal "is clearly and conclusively defective." Third, "the 'one subject' limitation was selected to place a functional, as opposed to locational, restraint on the range of authorized amendment." Last ... the one subject limitation should be viewed broadly rather than narrowly. [Footnotes omitted.]

Id. at 340. And finally, Floridians prescribed an overriding test to be applied to a constitutional amendment that has indirect effect upon the operation of several provisions of the constitution, as follows:

> Once the constitutional restraint is preceived to be functional [meaning the amendment has an indirect operational effect on some constitutional provision other than the one actually being amended] as opposed to locational [meaning the amendment directly amends the "locational" provision], substantial effect by the initiative proposed upon any other section or article of the Constitution becomes irrelevant. And, of course, "conflict" with existing articles or sections of the Constitution can afford no logical basis for invalidating an initiative proposal. Such an assertion ignores established patterns of constitutional construction. When a newly adopted amendment does conflict with preexisting constitutional provisions, the new amendment necessarily supersedes the previous provisions. Otherwise, an amendment could no longer alter existing constitutional provisions and the amendment process might, in every case, be frustrated by the judicial determination that a given proposal conflicts with other provisions.

Id. at 341, 342. (Emphasis added.).

In Fine v. Firestone, the Florida Supreme Court held:

> In Floridians we also held that the

> question of whether an initiative proposal conflicted with other articles or sections of constitution had "no place in assessing the legitimacy of an initiative proposal." 363 So.2d at 341. We recede from that language and find that how an initiative proposal affects other articles or sections of the constitution is an appropriate factor to be considered in determining whether there is more than one subject included in an initiative proposal.

448 So.2d at 990. The Florida Supreme Court retroactively applied the changed criteria to remove the purposed amendment from the ballot.

In sum, this brief history demonstrates that the Florida Supreme Court by judicial act changed the rules for amending the Florida constitution in mid-stream after Petitioners had relied successfully at great expense upon existing rules. The change was made at a time that made it impossible for Petitioners to obtain relief of any other kind. Moreover,

Petitioners have been denied an effective opportunity to protect their interests.

These facts are remarkably analagous to those in Brinkerhoff-Farris Trust & Savings Co. v. Hill, supra. In Hill, a taxpayer relied upon an established equitable procedure to test certain tax assessments in the Missouri courts. At the final stage of state judicial review, the Missouri Supreme Court refused judicial review of the issue presented on grounds that administrative review was available under the Missouri law. In reaching that decision, however, the Missouri Supreme Court expressly overruled one of its own opinions, relied upon by the Missouri taxpayer, that had firmly denied the existence of administrative relief in such a case. Moreover, in Hill, the time had run our through the operation of laches for

the taxpayer to seek the administrative review the Missouri Supreme Court now held was available.

Upon review of the state of facts in Hill, this Court stated:

> No one doubted the authority of the Laclede Case [the opinion overruled by the Missouri Supreme Court] until it was expressly overruled in the case at bar.
>
> ... We are of opinion that the judgment of the Supreme Court of Missouri must be reversed, because it has denied to the plaintiff "due process of law"--using that term in its primary sense of an opportunity to be heard and to defend its substantive right.
>
> First. It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense. The plaintiff asserted an invasion of its substantive right under the federal Constitution to equality of treatment.
>
> * * * * * *
>
> ... If the result above stated were attained by an exercise of the state's

legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious.... The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid ... state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.

It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction jurisdiction on this court.

But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff or the merits, although

> it may be observed that the plaintiff's claim is one arising under the federal Constitution and, consequently, one on which the opinion of the state court is not final; or with the accuracy of the state court's construction of the statute in either the Laclede Case or in the case at bar. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense--whether it has had an opportunity to present its case and he heard in its support. Undoubtedly, the state court had the power to construe the statue dealing with the state tax commission; and to re-examine and overrule the Laclede Case. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

281 U.S. 677-682, 50 S.Ct. 453,454.

The facts in the present case are legally indistinguishable from Hill.

Petitioners relied upon a settled rule of law laid down by the Florida Supreme Court. The Florida Supreme Court thereafter changed the law to Petitioner's great detriment without affording Petitioners a reasonable opportunity to protect their interests. This is a plain denial of due process.

SUMMARY OF ARGUMENT

In reliance upon guidelines prescribed in opinions of the Florida Supreme Court, Petitioners expended great sums of money and amounts of energy and time to have an initiative to amend the Florida constitution placed upon the November 1984 general election ballot. The Florida Secretary of State certified the ballot position. Thereafter, in culmination of state legal proceedings in which the Florida

Secretary of State and Attorney General refused to defend the ballot position and in which Petitioners were refused party status, the Florida Supreme Court changed the existing criteria and held that the proposal must be removed from the ballot. These facts constituted a violation of the requirements of due process of law as articulated by this Court in Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra.

CONCLUSION

For the reasons stated above, Amicus Curiae respectfully requests this Court to grant the writ and give the relief sought.

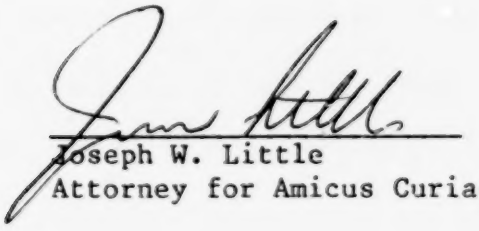
CERTIFICATE OF SERVICE

I hereby that a true copy of the foregoing motion and brief was mailed this 1st day of January, 1985, to:

Jim Smith, Attorney General of Florida
Attorney for George Firestone
Department of Legal affairs
The Capital
Tallahassee, FL 32301

James C. Mahorner, Esq.
Attorney for Petitioners
206 South Monroe Street
Tallahassee, FL 32302

Dennis M. O'Connor, Esq.
c/o School of Law -- Box 8087
University of Miami
Coral Gables, FL 33124



Joseph W. Little
Attorney for Amicus Curiae

Office-Supreme Court, U.S.
FILED
JAN 18 1985
ALEXANDER L. STEVAS,
CLERK

CASE NO. 84-998

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

ROBERT E. GIBSON, et al,

Petitioner,

vs.

GEORGE FIRESTONE,

Respondent.

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
SUPPLEMENTAL APPENDIX

James G. Mahorner
Attorney for Petitioner
1020 East Lafayette Street
Tallahassee, Florida 32301
Phone: (904) 656-3591

CASE NO. 84-998

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

ROBERT E. GIBSON, et al,

Petitioner,

vs.

GEORGE FIRESTONE,

Respondent.

ON WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
SUPPLEMENTAL APPENDIX

James G. Mahorner
Attorney for Petitioner
1020 East Lafayette Street
Tallahassee, Florida 32301
Phone: (904) 656-3591

UNITED STATES CIRCUIT COURT OPINION

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 84-3422

ROBERT E. GIBSON,
Plaintiff - Appellant,

and

ED HAVILL, et al.,
Intervening Plaintiffs-Appellants,

v.

GEORGE FIRESTONE, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Florida

(August 28, 1984)

Before: HILL and HENDERSON, Circuit Judges, and WISDOM*, Senior Circuit Judge.

HILL, Circuit Judge:

*Honorable John Minor Wisdom, U. S. Circuit Judge for the Fifth Circuit, sitting by designation.

This appeal touches upon a wide variety of complex and important issues, one of which proves to be dispositive of the dispute: did the district court abuse its discretion in refusing to enjoin the Florida Secretary of State from complying with the Florida Supreme Court's mandate to remove from the upcoming general ballot a proposed constitutional amendment that the Florida Supreme Court fould violative of the state constitution. We are unable to conclude that the district court abused its discretion in denying appellants' injunctive relief. Hence, we affirm.

An elucidation of the facts illustrates the difficult position in which appellants find themselves and the reasons why the federal courts are not empowered to remedy their plight. Appellants expended substantial sums in organizing support for a

proposed amendment to the Florida Constitution.[1] After acquiring the necessary signatures of 600,000 state electors, appellants submitted their citizens initiative petition to the Florida Department of State for verification. The Secretary of State, finding that the petition satisfied the format requirements of state law, issued a Certificate of Ballot Position to the proposed amendment, certifying it for placement on the November 1984 general election ballot.

Shortly after the Secretary of State certified the amendment, an action was filed in the Florida District Court of APpeals seeking its removal.[2] The suit named

[1]The proposed amendment is set out and discussed more fully by the Florida Supreme Court in its decision holding the amendment unconstitutional. See Fine v. Firestone, 448 So.2d. 984 (Fla. 1984).

[2]Martin Fine instituted the action in

Secretary Firestone as the defendant in interest and requested the Florida appellate court to issue a writ directing Secretary Firestone to remove the proposed amendment, primarily on the grounds that the proposal violated the state constitution's single-subject requirement for constitutional amendments. See Fine v. Firestone, 443 So.2d. 253, 256-57 (Fla. Dist. Ct. App. 1983).

Appellants then sought to intervene in the proceedings before the Florida District Court of Appeal. Arguing that Secretary Firestone has publicly voiced opposition to

the Florida appellate court. Although appellants named Fine as a defendent in their federal court suit, the district court dismissed Fine shortly before the final hearing on Secretary Firestone's motions to dismiss and for summary judgment. Appellants have not challenged that ruling; the record does not otherwise disclose the nature of Fine's interest in the outcome of this litigation.

the proposed amendment and had filed a response disclaiming any intention of supporting the merits of the proposal, appellants asserted their right to intervene as the real parties in interest. Although Secretary Firestone did not oppose appellants' motions to intervene, the state appellate court denied them party status but granted them lave to appear as amici curiae.

The Florida District Court of Appeal ultimately ruled that extraordinary relief was not available to direct the Secretary to remove the proposed amendment. Fine v. Firestone, 443 So.2d. at 255-56. However, the appellate court elected to certify the case to the Florida Supreme Court because questions of great public importance were presented.[3]

[3]The appellate court opined that the proposed amendment was sound under Florida law. In particular, the court reasoned that

The Florida Supreme Court accepted jurisdiction and ordered the proposed amendment removed from the general ballot. Fine v. Firestone, 448 So.2d 984, 993 (Fla. 1984). The court held that mandamus was an appropriate means for testing the constitutionality of the proposal, id. at 987, and that the amendment violated the state constitution's prohibition against multiple-subject constitutional amendments, id. at 987-93. Significantly, the court addressed only the state constitutional issue[4] and rested its decision entirely on its reading of article XI, section 3 of the

the proposal was not subject to attack under the single-subject provisions of the state constitution, see Fla. Const. art. XI, section 3, because the Florida Supreme Court had indicated that the provision was to be read broadly and with a pragmatic approach. See 443 So.2d at 256-57.

[4]The Court did not consider whether the proposal ran afoul of federal due process standards. See Id. at 986 n.1.

Florida Constitution. Id. at 987.[5]

Appellants then filed the present suit in the United States District Court for the Northern District of Florida claiming that the state proceedings in which they were refused leave to intervene deprived them of their right to vote, violated their rights to due process and equal protection and impaired their contract rights under art. I, section 10 of the U.S. Constitution. The complaint alleged jurisdiction under 28 U.S.C. section 1331(a) and 1343(3), 42 U.S.C. section 1983 and art. I, section 10 and the First and Fourteenth Amendments of the U. S. Constitution, and in its prayer for relief, requested the district court to grant an

[5]While appellants did not seek leave to appear before the Florida Supreme Court, perhaps because the appellate court upheld the proposal, they did proceed as amici at the behest of the court. Thus, the state courts had the benefit of appellants' arguments throughout the state proceedings.

"injunction against the Secretary('s) decertifying Proposition 1 or directing its recertification." The district court granted appellants' request for an advanced final hearing on their motion for injunctive relief and, after conducting such hearing, held that appellants had failed to state a claim on which relief could be granted. Appellants now appeal.

Our task is two-fold. First, we must consider whether the allegations stated in the complaint are sufficient to invoke the limited jurisdiction of the federal courts. Second, we must decide whethe appellants have stated a claim on which relief can be granted such that the district court abused its discretion by denying injunctive relief on that ground. To summarize our conclusions, we hold that the complaint properly invoked the subject matter jurisdiction of the

federal courts; however, appellants have not stated a claim on which relief could be granted. Thus, the denial of injunctive relief does not constitute an abuse of discretion.

I. JURISDICTION

Appellee questions whether the federal courts have jurisdiction to consider the claim stated by appellants' complaint. Federal subject matter jurisdiction is determined by the face of the well-pleaded complaint. Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 127-28 (1974); Gully v. First National Bank in Meridian, 299 U.S. 109, 112-13 (1936). Further, all well-pleaded allegations must be taken as true for purposes of determining the existence of federal jurisdiction. See Goosby v. Osser, 409 U.S. 512, 521 n.7 (1973) (citing authorities).

Here, appellants have alleged a deprivation of their first amendment right to vote as well as their fourteenth amendment rights to due process and equal protection. See Record on Appeal at 6 and 80. These allegations, whether sufficient to state a claim for relief, are adequate to invoke federal subject matter jurisdiction. See Goosby v. Osser, 409 U.S. at 521-22. Thus, we find that appellants have stated a claim that is cognizable under 28 U.S.C. section 1343 (3), the jurisdictional counterpart of 42 U.S.C. section 1983.[6]

II. INJUNCTIVE RELIEF

The relief requested of the district court was an order "granting an injunction

[6]Because both parties have impressed upon this court the need for an early disposition of this appeal, we abbreviate our discussion of the jurisdictional issue and proceed to consider the merits of appellants' claims.

against the Secretary('s) decertifying Proposition 1 or directing its recertification." Record on Appeal at 11.[7]

[7] Appellants also asked the district court to "declare that (their) right to vote on Proposition 1 cannot be affected by straw man litigation." Record on Appeal at 11. In essence, appellants claimed that the state proceedings were non-adversarial, because Secretary Firestone declined to defend the merits of the proposed amendment, and, therefore, that the Florida Supreme Court decision should be declared void. See Record on Appeal at 152-54.

In a quite different context, this court has recognized that principle that a judgment produced by nonadversarial proceedings is a mere form and not binding on other courts. See Aerojet-General Corp. v. Askew, 511 F.2d 710, 720-21 (5th Cir. 1975) (analyzing precedents). Aerojet-General, however, involved state proceedings instituted to avoid the effect of a federal court decision adjudicating title to land in Florida. Noting that the Deputy Attorney General for the state had admitted the nonadversarial nature of the state court proceedings, the Fifth Circuit held that it was not obligated to follow the state court ruling in favor of the federal court defendant. Id. at 7821. The present case, unlike Aerojet-General does not turn on whether the prior state court decision is entitled to res judicate effect. Appellants were not parties to the proceedings in state court and cannot be bound by any judgment rendered there.

The Griffin Court analogized to Briscoe v. Kusper, 435 F.2d. 1046 (7th Cir. 1970). In Briscoe candidate nominating papers for city alderman elections were invalidated by the Chicago Board of Election Commissioners on the day before the scheduled election. The commissioners struck certain nominations on the ground that they contained improper duplicate signatures and failed to include middle initials for signatures on the accompanying petitions. In doing so, the commissioners announced a sharp break from

Absent an argument that the district court was bound by the Florida Supreme Court decision, appellants had no grounds for requesting the court to declare tha decision void. Federal courts have no appellate review authority over judgments of state courts. See, e.g., Chicago, R. I. & P. R. R. v. Stude, 346 U.S. 574, 580-81 (1954); Reynolds v. Georgia, 640 F.2d. 702, 703 (5th Cir.), cert. denied, 454 U.S. 865 (1981). For this reason, appellants could only request injunctive relief; no declaration that the Florida Supreme Court's decision was void was available.

prior policy and effectively precluded the candidacies of those who had relied on earlier Board interpretations. Under these circumstances, the Seventh Circuit held that candidates and voters had been unconstitutionally denied the right to participate in aldermanic elections by the last minute policy shift. The court declared those practices violative of the first and fourteenth amendments and enjoined the future use of such procedures. Id. at 1048, 1058.

Appellants argue that Griffin and Briscoe are indistinguishable from the present case, but we find two important distinctions. First, the federal rights vindicated by the First Circuit in Griffin and the Seventh Circuit in Briscoe centered on the first amendment right to vote and the closely related right to participate in the election process. In Griffin voters were

actually stripped of their ballots after they had been cast and given no alternative means of voting in the primary, resultin in the victory of a candidate who had not received a majority of the votes cast. In Briscoe candidates for local office were, within hours of the preparation of ballots, removed from the ballot by an arbitrary, sudden change in policy, resulting in the deprivation of both the candidates' and the nominating voters' rights to participate in the election. In this case, however, no voters have been denied the right to vote, nor have any candidates lost their right to participate in the election. The Griffin and Briscoe decisions vindicate rights universally recognized as the lynchpines of our democratic form of government: the rights of candidates to offer themselves for public office and the rights of voters to vote for

or against those candidates. The rights alleged by appellants, conversely, derive from wholly state-created procedures by which issues that might otherwise be considered by elected representatives may be put to the voting populace. The state, having created such a procedure, retains the authority to interpret its scope and availability. Clearly, appellants can claim no constitutionally-protected right to place issues before the Florida electorate; any opportunity to do so must be subject to conpliance with state constitutional requirements.[8]

[8]As we perceive it, appellants' alleged deprivation does not raise serious first amendment right to vote concerns. Appellants do not argue that they were denied the right to vote. They do claim that their first amendment associational rights encompass their efforts to secure a position on the general ballot for Proposition One. Those free association rights, appellants maintain, protect them against unreasonable burdens on ballot access. While we express no view on

More fundamentally, Griffin and Briscoe did not involve a request by state voters to reverse a decision by a state supreme court construing its own constitution. It is true that the First Circuit in Griffin effectively delayed the impact of the Rhode Island Supreme Court's interpretation of state law to allow voters to comply with that ruling, but the court did not order invalidated ballots counted. Appellants ask us to issue just such an order, one directing the Secretary of State to do what the Florida Supreme Court has declared violative of the state constitution. Neither Griffin or Briscoe supports application of a remedy so at odds with basic notions of constitutional

the scope of appellants' rights of free association in this context, we do not consider the Florida Supreme Court's judgment invalidating Proposition One to be an "unreasonable burden" on appellants' rights to ballot access.

jurisprudence and federalism. Although federal courts have broad equitable powers to remedy proven constitutional violations, injunctive relief must be tailored to fit the nature and extent of the established violation. Haitian Refugee Center v. Smith, 676 F.2d. 1023, 1041 (5th Cir. Unit B, 1982) (citing cases). The violation appellants seek to establish, collusion between state officials to deny appellants access to state court proceedings, would not be remedied by an injunction directing Secretary Firestone to restore the proposed amendment to the upcoming general ballot.[9]

[9]While we must take appellants' well-pled allegations as true, we seriously question whether they have suffered any harm by being denied leave to intervene in the state suit. As amici, appellants were allowed to file all papers and make any arguments that parties to the suit could have made. Appellants conceded at oral argument that they fully expressed their views in the Florida Supreme Court. Thus, we find it difficult the prejudice appellants allegedly

We cannot ignore the practical effect of an order granting appellants' requested relief. To issue such an order would be tantamount to a decision by this court that the Florida Supreme Court has misread, or misapplied the single-subject requirement of article XI, section 3 of the Florida Constitution. In no other way can we direct the Secretary of State to comply with the order requested by appellants, while allowing him to honor the judgment of the state's highest court. It is far too late to dispute the principle that state court decisions resting on adequate and independent state grounds are not subject to federal review. Herb v. Pitcairn, 324 U.S. 117, 125-26, 65

suffered. Nevertheless, we assume for purposes of ruling on the propriety of the district court's ruling that appellants were prejudiced by the alleged collusive proceedings.

S.Ct. 459, 463, 89 L.Ed. 789 (1945); see Wainwright v. Sykes, 433 U.S. 72, 81, 97 S.Ct. 2497, 2503, 53 L.Ed.2d. 594 (1977).[10] The district court did not abuse its discretion by applying that principle to deny appellants' injunctive relief. Hence, we AFFIRM.

[10]Appellants' plight closely resembles the situation landowners often encounter when government officials determine that public interest necessitates a change in the character of their neighborhood, see e.g. Woodland Market Realty Co. v. City of Cleveland, 426 F.2d. 955 (6thh Cir. 1970) (commercial leaseholder's diminished property value occasioned by city's urban renewal project and consequent loss of customers does not constitute fourteenth amendment "taking"), or the predicament real estate developers face when agency officials promulagate stiffer regulations concerning development projects, see e.g. Deltona Corp. v. United States, 657 F.2d. 1184, 228 Ct.Cl. 476 (1981), cert. denied, 455 U.S. 1017, 102 S.Ct. 1712, 72 L.Ed.2d 135 (1982) (frustration of developer's investment-backed expectations by Army Corps of Engineers' stiffening of permit regulations does not amount to "taking"). Similarly, appellants' expenditures of funds and resources in reliance on their interpretation of prior Florida Supreme Court decisions does not, without more, rise to the level of a due process violation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the Suppmental Appendix to Petition for Writ of Certiorari was served by hand delivery, this 16th day of January, 1985, on Asst. Atty. General Mitchell Franks, Attorney for the Secretary of State of Florida, The Capitol Building, Tallahassee, Florida.

James G. Mahorner

MOTION FILED

JAN 2 2 1985

IN THE

Supreme Court Of The United States

OCTOBER TERM 1984

Case No. 84-998

ROBERT E. GIBSON, et al,

Petitioner,

vs.

GEORGE FIRESTONE,

Respondent.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI ON BEHALF OF THE VOTING RIGHTS COMMITTEE, THE NATIONAL TAX LIMITATION COMMITTEE, THE AMERICAN COUNCIL FOR HEALTH CARE REFORM, THE TAX LIMITATION FOUNDATION AND HOWARD JARVIS

AND

ACCOMPANYING AMICUS CURIAE BRIEF

ERIC J. HAUGDAHL
Attorney of record for amicus curiae
1020 E. Lafayette, Suite 208
Tallahassee, Florida 32301
Telephone: (904) 878-0215

PRESS OF BYRONS INC., CASSELBERRY, FLORIDA

TABLE OF AUTHORITIES

	Pages
Aero-General v. Askew, 511 F.2d 710 (5th Cir. 1975)	3
Amador Valley v. State Board, 22 Cal.3d 208, 583 P.2d 1281 (Cal. 1978)	5
Anderson v. Celebreeze, 103 S.Ct. 1564 (1983)	4
Briscoe v. Cuspor, 453 F.2d 1046 (7th Cir. 1970)	3
Duncan v. Tothyress, 657 F.2d 691 (5th Cir. 1981)	3,6
Fine v. Firestone, 443 So.2d 253 (Fla. 2 DCA 1983)	3
Gibson v. Firestone, 741 F.2d 1268 at 1273 (11th Cir. 1984)	1
Griffen v. Burns, 570 F.2d 1065 (1st Cir. 1978)	2,6
NAACP v. Alabama, 357 U.S. 449 (1958), 377 U.S. 288 (1964)	3,6
Williams v. Rhodes, 393 U.S. 23 (1968)	4,6

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI ON BEHALF OF THE VOTING RIGHTS COMMITTEE AND THE NATIONAL TAX LIMITATION COMMITTEE

The Motion of the Voting Rights Committee, The National Tax Limitation Committee, The American Council for Health Care Reform, The Tax Limitation Research Foundation and Howard Jarvis respectfully represents:

1. The Voting Rights Committee is a duly registered and active political action committee in the State of Florida. The Voting rights Committee seek to protect, enlarge and enhance the citizen's rights and privileges to vote upon initiatives and other issues. In furtherance of its objective, the Voting Rights Committee has proposed an Amendment through the initiative process contained in Article XI Section 3 *Fla. Const.* (1968), which it is currently circulating for the voter's approval. In addition, the Voting Rights Committee has participated as amicus curiae in the Florida State Courts in litigation seeking to remove other initiative proposal from the ballot. In such litigation the Committee supported the voters' rights to vote upon all initiatives. Thus, the Voting Rights Committee is vitally interested in the outcome of this cause and the legal principles established in this cause.

2. The National Tax Limitation Committee, is a corporation organized under the laws of California (there are no affilitates of this organization, other than the Tax Limitation Research Foundation), with over eight hundred thousand members and supporters throughout the United States, which is dedicated to various forms of tax reform. The National Tax Limitation Committee has sponsored several initiatives on tax issues, primarily in California

and Montana, and intends to use the initiative process in the future. Further, the National Tax Limitation Committee supports numerous initiatives which are now being circulated, and intends to support such initiatives in the future. The National Tax Limitation Committee requires a declaration of federal rights inherent in initiatives and referenda, and supports the positions taken herein.

3. The Tax Limitation Research Foundation is an affiliate of the National Tax Limitation Committee, and provides various research services to those interested and advocating tax reform. The Tax Limitation Research Foundation subscribes to the views expressed herein.

4. The American Council for Health Care Reform is an organization with its principal place of business in Falls Church, Virginia. The American Council for Health Care Reform plans to propose initiatives and referenda in the future. The American Council for Health Care Reform subscribes to the views contained herein and to avoid the shadow of any future referenda being found to have no federally protected rights, has joined in this brief.

5. Howard Jarvis, is an individual who has sponsored referenda, for example, the famous "Proposition 13," regarding taxation. Mr. Jarvis subscribes to the views containted herein.

6. Movants have examined the briefs filed herein by the Petitioners and Amicus Curiae Joseph Little. Movants will present to the Court an argument on two issues which have not been presented to the Court, but which are dispositive of the questions at hand; and which were decided by the Eleventh Circuit:

> 1. WHETHER AN INITIATIVE PROPOSAL IS A "CANDIDATE" WITHIN THE MEANING OF THE ESTABLISHED CASE LAW PROTECTING "CANDIDATES" FROM STATE

COURT ACTIONS WHICH ARE COLLUSORY OR NON-ADVERSARY, i.e. (*GRIFFIN v. BURNS* AND *DUNCAN v. POTHYRESS*).

2. DOES AN INITIATIVE PROPOSAL, OR THE INDIVIDUALS SUPPORTING INITIATIVE PROPOSALS, ENJOY THE RIGHT OF DUE PROCESS AND EQUAL PROTECTION?

7. Movant's arguments will establish that the answer to the questions propounded above is yes, or if there is no such protection under existing law, that the Constitution mandates such protection.

8. Movants vital interests in the maintenance or ability to maintain referendum or initiative proposals raise legal issues identical to that presented in this cause. These issues are vital public issues which should be addressed by this Court:

Citizens in recent years have found that it is increasingly necessary to resort, again and again, to initiatives and referenda to protect their interests to advance causes that the public overwhelmingly favors, but which legislatures refuse to address. Absent such procedures, large segments of the voters will find their wills thwarted. And the recent spate of judicial removal from the ballot of the initiatives or referenda make the question of rights of such proposals or the persons advocating such proposals a paramount issue of great public importance.

9. The proposed brief of Movants is annexed hereto. Movants have the Petitioner's permission to file this brief. The State of Florida, Secretary of State (Respondent) through its attorney general has not granted such permission, for the sole reason that Movants were not amici below. Such reasoning is entirely devoid of compelling rationale. Movants are vitally interested in this cause, and propose to brief issues dispositive of this cause. See *On Lee*

v. United States, 434 U.S. 924 (1952) criticizing a former practice of the Solicitor General in automatically refusing to consent to the filing of amicus briefs.

ERIC J. HAUGDAHL
1020 East Lafayette Street
Suite 208
Tallahassee, Florida 32301
(904) 878-0215
Counsel of Record for Movants

Case No. 84-998

Supreme Court Of The United States

OCTOBER TERM 1984

ROBERT E. GIBSON, et al,

Petitioner,

vs.

GEORGE FIRESTONE,

Respondent.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ERIC J. HAUGDAHL
Attorney of record for amicus curiae
1020 E. Lafayette, Suite 208
Tallahassee, Florida 32301
Telephone: (904) 878-0215

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES i

STATEMENT OF CASE ..... ii-v

ARGUMENT 1

AN INITIATIVE PROPOSAL IS A "CANDIDATE" WITHIN THE MEANING OF THE ESTABLISHED CASE LAW PROTECTING "CANDIDATES" FROM STATE ACTION AND STATE COURT ACTIONS WHICH ARE COLLUSORY OR NON-ADVERSARY. ALTERNATIVELY, THE COURT SHOULD ALTER THE EXISTING CASE LAW TO PROVIDE INITIATIVES SUCH PROTECTION

AN INITIATIVE PROPOSAL, AND THE INDIVIDUALS SUPPORTING IT, ENJOY THE RIGHT OF DUE PROCESS AND EQUAL PROTECTION

CONCLUSION 7

CERTIFICATE OF SERVICE 7

STATEMENT OF CASE

Amicus agrees with the statement of the case made by Petitioner.

Amicus notes that the district court order dismissed the complaint for failure to state a cause of action (Appendix 72) primarily because "There is no right to vote on the amendment" (Appendix 72). The Eleventh Circuit, see *Gibson v. Firestone*, 741 F.2d 1268 at 1273 (11th Cir.,1984) footnotes eight (8) and nine (9), also held that there is no first amendment right to vote upon the initiative.

Amicus also notes that the well pled facts of the complaint and intervening complaint (Appendix 30-54) allege:

1. The gathering of 600,000 signatures to place Amendment One on the ballot, and the concomitant expenditure of over $200,000.00.

2. The receipt of a certificate of ballot position and being on the ballot.

3. The removal of the amendment from the ballot is a court proceeding which was non-adversary and collusory, and in which the Petitioners were denied party status.

4. That the decision removing the amendment from the ballot rested upon the retrospective "reccission" from the established Florida law as to the proper form of amendments. This decision applied the new criteria retrospectively, despite the drafter's reliance on the settled law.

ARGUMENT

AN INITIATIVE PROPOSAL IS A "CANDIDATE" WITHIN THE MEANING OF THE ESTAB-

LISHED CASE LAW PROTECTING "CANDIDATES" FROM STATE ACTION AND STATE COURT ACTIONS WHICH ARE COLLUSORY OR NON-ADVERSARY. ALTERNATIVELY, THE COURT SHOULD ALTER THE EXISTING CASE LAW TO PROVIDE INITIATIVE'S SUCH PROTECTION.

The petitioners herein have pled a violation of their rights, which if proven, would entitle them to relief in a federal forum. Petitioners have, as the Eleventh Circuit notes, found themselves in a "difficult position". Petitioners successfully placed an initiative proposal to cut taxes (Appendix 31) on the ballot, after demonstrating the support of 600,000 voters and spending in excess of $200,000.00 to gain ballot position. Yet, after these efforts, the Petitioners find themselves removed from the ballot after a court proceeding in which they were deprived of the fruits of their labor, despite the fact, that they WERE NOT parties to the proceedings and, even more nightmarishly, where the announced positions of both plaintiff and defendant in the suit was to remove the issue from the ballot!

Why then did the federal courts refuse to remedy the plight of the Petitioners? The District Court and the Eleventh Circuit both eschewed reliance upon *res adjudicata*, since as non-parties, the Petitioners were entirely unbound by the decision. It was not lack of federal authority to protect parties from collusory proceedings or being victimized by lawsuits in which their substantial interest are trampled without their being allowed an opportunity to defend themselves. In *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) the federal courts nullified and held for naught and by injunction prevented a State Supreme Court decision from affecting the federal rights of non-parties to the State Court action. In *Aerojet-General*

v. Askew, 511 F.2d 710 (5th Cir. 1975) a Florida Supreme Court desision was held for naught and *a party* to the decision relieved from the effects of the decision after the Federal District Court found that the cause was collusory and non-adversary.

If the Petitioners fail in proving that the case was collusory, the retrospective invalidation of their good faith reliance upon the existing law and the appearance of the existing law[2] is sufficient to grant relief. *Briscoe v. Kusper*, 453 F.2d 1046 (7th Cir. 1970). Simply put, the rules of the game may not be changed in the seventh inning. *Duncan v. Pothyress*, 657 F.2d 691 (5th Cir. 1981). Lastly, the federal courts may revise the effects or hold for naught state court decisions which are not on adequate state grounds. This court has *twice* reversed the Alabama Supreme Court finding that Alabama could not constitutionally alter its settled procedures to deny litigants their rights *NAACP v. Alabama*, 357 U.S. 449 (1958) and *NAACP v. Alabama*, 377 U.S. 288 (1964).

The Eleventh Circuit bottoms its decision upon the "effect" of the injunction requested: the "nullification" of a state supreme court decision, and the absence of a federally protected right. Both positions are groundless. The discussion above demonstrates the availability of a limited form of relief in the case of collusory proceedings, whether or not the victimized party is privy to the litigation, or, where state officials or state courts impose novel requirements retroactively to deny vested federal rights. The only remaining question is the existence of a federal right.

---

[1]It is vital to apprehend that the Florida District Court of Appeal, First District *unanimously* held the amendment to be sound, see *Fine v. Firestone*, 443 So.2d 253 (Fla. 1DCA 1983), under the existing decisions construing the rules for amendments. The Court found the amendment sound *despite* the fact that the parties to the cause both favored removing the amendment.

The Courts below, without benefit of citation, held that an amendment had no constitutional standing. The case of *Lubin v. Panish*, 415 U.S. 709 (1974) recognizes that the only means for individual citizens to protect their views is through candidates, parties or initiatives. That the right to organize into parties is protected, and the further right to organize *effectively* is also recognized; and that the right includes ballot access is beyond question. This court has further held that barring a candidate from the ballot affects his supporters right to association. *Anderson v. Celebreeze*, 103 S.Ct. 1564 (1983). The right to organize is meaningless if a state can arbitrarily bar the candidate from the ballot. See, e.g. *Williams v. Rhodes*, 393 U.S. 23 (1968). In advancing the candidacy of Amendment One, the individual proponents have formed organizations (Floridians for Tax Relief, the largest political action committee in Florida, with more than 14,000 members, is a Petitioner herein) and engaged in associational activities identical to that of political parties or candidates. In fact, Florida law requires those circulating initiatives to register as a political committee and subjects these political committees to regulation virtually identical to that of candidates. See Florida Statutes Chapter 106.

Large segments of the population, including amici herein, increasingly find themselves estranged from the state legislatures. The Voting Rights Committee, for example, has been completely unable to obtain the items on its program through the legislature. But, as Floridians for Tax Relief discovered, the Florida legislature (as many other referenda concerning taxes, whether increases or decreases have flourished recently in Ohio, California, Michigan, Minnesota and diverse other states, and some municipalities e.g. Dade County, Florida) did respond to a few of its concerns as the amendment drive began.

Amendment One now before the Court, was a result of the perception, by a substantial segment of the Florida

electorate that the legislative and executive branches of the State government were not responding to the voters' concerns that the Florida budget was growing too quickly.[2] These citizens, or many of them, resorted to the initiative method of amending the Constitution to reach their political goals when the other branches of government were not responding to their entreaties. The initiative is in many respects identical to a candidate: the public debate is similar, and the First Amendment activities are identical. In any initiative or referendum there will be associational activities and speech activities, identical to any other political campaign. In removing Amendment One,[3] the candidacy of the amendment and the philosophy of government it espoused were dealt a severe blow. The electorate's ability to effect programs which the legislature or executive do not wish to put forward is lost; here, the reforms in government tax laws sought by the Petitioners are now irrevocably lost. Thus, it is demonstrated that candidates and initiatives serve similiar purposes and implicate the same types of activities. The California Supreme Court in the famous "Proposition 13" case, *Amador Valley v. State Board*, 22 Cal.3d 208, 583 P.2d 1281 (Cal. 1978), noted that initiatives and the simple circulation of initiatives serve to "guide and goad" the legislature, and serve as a "battering ram" to spur the state government on when the public's sentiment is that the legislature is in error.

The referendum or initiative is thus a vital tool in democracy, a means for the advancement of political ideals by

---

[2]The state budget had doubled from 1979 to 1984.

[3]Amendment One was removed not because of the violation of any election laws. The Florida Secretary of State, who regulates elections, had already certified (which certification was never challenged) the issue for the ballot. (Appendix 31, 49.) The issue was removed solely on the basis of its *content*. (Appendix 53.) This certainly brings into play the question of the validity of excluding items from the ballot because of their content. Such a prior restraint places an extremely heavy burden on Respondents to justify such a restraint on voting.

peaceful means, a resort to "petition to the government for a redress of grievances;" See U.S. Const. Amend 1. Such activity which is clearly within the First Amendment, should be entitled to constitutional recognition.

AN INITIATIVE PROPOSAL, AND THE INDIVIDUALS SUPPORTING IT, ENJOY THE RIGHT OF DUE PROCESS AND EQUAL PROTECTION

Amici concede that no state is obliged to offer the citizens the privilege of amending the state constitution by initiative. But once having given the right, the State must in all of its actions comply with due process and equal protection. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978). The federal courts will force state officials to comply with the unambiguous requirements of state election law, *Duncan v. Pothyress*, 657 F.2d 691 (5th Cir. 1981). Thus, it is nonsense to say that states can do willy nilly as they see fit to an initiative. The right is given, it must then be regulated by state officials in a constitutional matter.

As an alternative, the 14,000 members of Petitioner, Floridians for Tax Relief, and the various individual Petitioners have an unquestioned right to the holding of an election, if the state law so requires.[4] If Respondent is successful in preventing a vote, open season has been declared on unpopular groups or candidates. States may on totally frivolous pretexts (see the *NAACP v. Alabama* line of cases) enjoin and issue prior restraints against all those it wishes to suppress through the use of collusory suits, and the blocking of the affected parties' access to the

[4]The various briefs in the matter amply catalog the reason why the State of Florida and Respondent, Firestone are obligated to hold the election. It must be recalled that none of the petitioners were party or privy to any party who participated in the "litigation" striking the ballot question, despite their request to do so.

Courts. This is not government by laws, or due process or equal protection, it is rather oppression, and a bad dream similar to "Catch 22."

SUMMARY OF ARGUMENT

Petitioners have already amply demonstrated that their substantial procedural rights have been violated. Federal protection extends to state lawlessness invoving initiative proposals, which are a form of fundamental exercise of voting, speech and associational rights.

CONCLUSION

This question is of nation-wide importance, as initiative, referenda and other such popular means of electoral expression, are currently under an undeserved shadow of lack of constitutional protection, given the Eleventh Circuit's position in this cause. Amici and others will continue to seek their political goals throught these means, as will other large segments of the population who perceive failures in the legislative and executive branches of their state governments. The Court should grant certiorari to fully examine the pressing questions presented by this litigation.

CERTIFICATE OF SERVICE

I hereby certify that three (3) true copies of the Motion for leave to file amicus curiae brief and the brief were mailed, first class, with sufficent first class postage affixed thereon, on the eighteenth day of January, 1985, to each of the following (all parties who have filed appearances):

JAMES G. MAHORNER, ESQ.
1020 E. Lafayette St, Suite 207
Tallahassee, Florida 32301
Attorney of record, petitioners

JOSEPH LITTLE
3731 Northwest 13th. Place
Gainesville, Florida 32605
Attorney of record for amicus,
JOSEPH LITTLE

MITCHELL FRANKS
Attorney General's Office
The Capitol
Tallahassee, Florida 32301
Attorney for Respondent, Firestone

ERIC J. HAUGDAHL
Suite 208
1020 E. Lafayette St.
Tallahassee, Florida 32301
(904) 878-0215
Attorney of record for amici